00108153

BOMBAY BRANCH
OF THE
ROYAL ASIATIC SOCIETY.
TOWN HALL, BOMBAY.

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018

108153

Minutes &c. on Law Reform.

00108153

Index.

Minute of Sir Erskine Perry proposing a Court of Simple Procedure at Bombay for all petit suits	Dated 3 June 1843
Minute of Sir Henry Roper on same subject	" 4th Augt 1843
Minute of Sir Lawrence Peel on same subject and controverting views of Sir Erskine Perry	" 13th Feby 1844
Report of Indian Law Commission on same subject with proposed Draft act	" 15th Feby 1844
Letter of Sir Erskine Perry to Governor of Bombay on same subject in answer to Sir L. Peel	" 22d May 1844
Letter of Sir L. Peel in reply to Sir Erskine Perry	" 22d Feby 1845
Letter of Sir J. P. Grant on the same subject	" 14th Feby 1845
Letter and Minute of Sir H. Roper on same subject	" 10th Jany 1845
Reply of Sir Erskine Perry to Sir H. Ropers Strictures	" 25th Jany 1845
Reply of Sir H. Roper to the above	" 31st Jany 1845.

APPENDIX.

Minute on the Supreme Court, (Bombay) by Sir Erskine Perry, Puisne Justice.

1. The question, upon which the Judges have been requested to deliver their opinion, by the Law Commissioners, in the 7th and 8th paras. of their letter dated 6th May 1843, may be stated thus 'What number of Officers, and what amount of Salaries would be required to render the Supreme Court efficient in every department, if it were now to be established for the first time ?' for the queries as to consolidation of Offices in para. 7, seem all incorporated in the above general inquiry.

2. If the examination of this subject is to be made with reference to the existing procedure of the Court, it may be very easily disposed of, for, with the exception of one or two slight consolidations which may, I think, be effected, though with more nominal than real benefit, I conceive that very few beneficial alterations can be made. But as the inquiry touches upon a subject to which I have paid a good deal of attention, and as I feel a strong conviction that the working system of the Court, with respect to its efficiency to the public, is by no means well adapted to its purpose, that it is grievously costly both to Government and to Suitors, that the expenditure it occasions to the latter is ordinarily so great as to shut out from the Court a large portion of bonâ fide claims, that this costliness of procedure is unattended with any corresponding advantage in bringing cases clearly and fully before the Judge, and as I believe that these defects are nowise inherent in the system, but are easily removable by the Legislature, I venture to put before the Law Commission, at some length, the grounds on which I have adopted the above conclusions, and the remedies which I conceive are applicable. It will be found that the latter involve a complete answer to the question in the first paragraph.

3. It may be well to commence with a slight sketch of the legal wants of the Suitors amenable to the Supreme Court at Bombay, and of

the amount of business transacted in it. The population of the Island of Bombay is said to consist of above 300,000 souls, and these, with the few hundred Europeans scattered over the Presidency, are all that the Court has any jurisdiction over. But it is impossible to measure the amount of law business which may be calculated to arise in a population of this number by any *data* which may be furnished from the statistics of a European community of equal extent. In Europe the great bulk of the population are hewers of wood and drawers of water, day labourers living on their daily hire, and possessed of no funds on which civil controversies can arise ; the commercial classes, on the other hand, are composed comparatively of very few individuals ; in an Indian trading community however, and especially in Bombay, it is difficult to conceive, till witnessed, the extent to which mercantile adventures and all kinds of speculation are diffused throughout the masses. Hence arises an infinitude of disputes, and with them an urgent necessity for a simple tribunal which shall baffle dishonesty and adjust unavoidable controversies.

4. Notwithstanding, however, that these fertile elements of litigation in a Hindoo community are always in operation, the total amount of business in the Supreme Court is very small, as will be seen from the following Tables, which I have drawn up from the books of the Court for the last three years.

No. 1.

Number of Causes tried on the Plea Side during the years 1840—1841—1842.

	1840.	1841.	1842.
Defended Causes, ...	27	23	42
Undefended ditto, ...	7	9	13
Total,.....	34	32	55

No. 2.

Number of Causes tried in the Small Cause Court (Debts under Rs. 360) during the same period.

	1840.	1841.	1842.
Defended Causes, ...	116	98	87
Undefended ditto, ...	527	555	560
Total,.....	643	653	647

No. 3.

Number of Decrees made in Equity Suits during the same period.

	1840.	1841.	1842.
Decrees on argument, ...	7	18	15
Ditto by consent, ...	6	0	3
Total,.....	13	18	18

5. The whole of the above business, with the exception of the small causes, which occupy from two to three hours every Thursday, is transacted in Term time, and consumes about 52 days. *(a)*

(a) The sittings of each Judge throughout the year amount to about 114 days, thus—

	Days.
Four Terms of 19 days each, but excluding Sundays, Thursdays, alternate Mondays, and Hindoo holidays, amounting to about 13 each,.....	52
Four Criminal Sessions of about eight days each, gives to each Judge, ...	16
Two days in Chambers, per week for small causes, and for Insolvent Court, gives to each, say	46
Total,.....	114

and the total number of sitting days for the public by both Judges conjointly is 176.

6. It will be seen therefore, that the amount of business transacted is exceedingly small, and although the number of Suits in the Mofussil Courts is annually increasing, those in the Supreme Court appear to decline in a like ratio. *(b)* If this result were the consequence of an improved state of morality, or of a growing conviction that a speedy remedy could always be ensured against injustice, it would be matter for sincere congratulation, but no such Utopian view can be entertained by any one who knows Bombay, or the Indian character generally.

7. The explanation therefore is to be sought elsewhere, and it is to be found, I conceive, in the extreme costliness of proceedings in the Court, and in the uncertainty which waits upon decision from the complicated Codes of practise in operation; both of these causes being in fact resolvable into one, viz. the defective procedure of the Court.

8. The expences of suing on the Plea Side of the Court are given in the two following Tables, which I have framed from the Taxing Officer's Books on bills taxed during the last three years.

No. 1.

Taxed Costs in Defended Causes.

	1840.	1841.	1842.
Plaintiff's Costs, ...	733	592	564
Defendant's ditto, ...	635	430	612
Total,..... Rs.	1368	1022	1176

No. 2.

Plaintiff's Taxed Costs in Undefended Causes.

	1840.	1841.	1842.
Exparte, ... Rs.	494	451	400
Cognovits, ... Rs.	159	175	233

(b) The number of plaints filed on the Common Law side of the Court have fallen off 20 per cent. during the last three years, as taken on an average of the preceding ten years.

9. It thus appears that a defended cause in the Supreme Court costs the losing party about 1,200 Rupees, that an undefended cause costs about 450, and that even in causes when the defendant confesses the claim or gives a cognovit on the first opportunity he has to do so, the expences amount to no less than 189 Rupees. (*a*)

10. No one I think can look at these sums total without perceiving that they are enormously high, whether taken absolutely, or in relation to the costs of litigation in England. For although law proceedings are very expensive there, and so much dreaded that, as Lord Brougham stated in a Debate during the present Session, a wise man sits down under any loss not exceeding £150 rather than bring his case into Court, still the great bulk of the expenses in England consists in the expenses of conveying witnesses to distant Courts, and of subsisting them till the trial is over—whereas in India no such item ever enters into a bill of costs, and I think I may safely say that, with the exception of briefs to Counsel, nine-tenths of the items in the bills alluded to are referrible to mere useless procedure and needless fees.

11. I offer as an illustration of the last remark the bills of costs on suing in the Small Cause Court, which, as I have before observed, entertains a jurisdiction over claims not exceeding Rupees 350; and in order to obviate an objection that lies on the surface, I have no hesitation in stating that, so far as my experience goes, the immense expenditure which attends a trial in the full Court is not rewarded by bringing the case to be tried a whit more satisfactorily before the Judges, and, for reasons which I will state hereafter, I believe that the materials for a correct judgment are more frequently supplied in the Court of simpler procedure.

Average costs of trial on defended causes in the Small Cause Court.

	Rs.
Plaintiff's costs, ...	37
Defendant's ditto,.....	13
Total,.....	Rs. 50

Costs in undefended causes.

	Rs.
Exparte causes, ...	41
Cognovits given, ...	12

(*a*) These tables do not in point of fact represent the total average cost of litigation, because they are founded upon those bills only which are taxed, (probably not more than half of the total number of bills,) and the bills of larger amount are not brought into the Master's Office at all for taxation, as the Attornies are contented to make a small reduction to the party, and so to avoid the taxation. It is impossible therefore, even for the Judge, when he sets about the inquiry to ascertain what the actual average cost of suing in his own Court amounts to.

12. But if the expenses of suing on the Common Law side are thus high, they are trifling when compared with those on the Equity side, and it is perhaps sufficient to say that as the length of an Equity suit when compared with a Common Law cause may be reckoned by years almost instead of months, so the costs of such suits may be counted in thousands instead of hundreds of Rupees, as in the other case.

13. Having thus shown how costly litigation is, and having stated my opinion that it is in great part referrible to defective procedure, I will now proceed to show what that procedure is.

14. When Sir Elijah Impey had the task before him of framing a Judicial Establishment for Calcutta, as the object was to afford a tribunal for every question that might arise, whether Civil or Criminal, legal or equitable, of Ecclesiastical or Admiralty Cognizance, the course which he adopted of attributing to the Court to be established the different jurisdictions which he had seen parcelled out amongst different tribunals in England, as it was the most obvious, so possibly was the most unobjectionable which he could have pursued. But as the object to be attained in every different department of the Court was precisely the same, namely, to bring forward the case in controversy in the clearest and least vexatious manner possible, it might have been imagined that a uniform Code of practise directed to that end, would have been devised, preserving all the good portions of the methods in operation in the different Courts for discovery of the facts, and rejecting all the bad, so as to form one rational simple system, which would have been as satisfactory to the Judge to administer as to the public whom it would have benefitted. When it is seen, on the other hand, that the whole of the contradictory, complicated, expensive Codes of practise of all the different Courts in England have been imported bodily into the *one* Supreme Court of India; that on this side of the Court facts may be only elicited by vivâ voce examination, that on another they cannot be brought before the Court except in writing; that a party to the cause may not be examined in the case in one instance (at Law), that he may be in the same case (in Equity); that the decision of the Court on the Plea side will give a matter in dispute to one party, that the decision of a Court of Equity will give it to another (in case there are funds sufficient to keep up the litigation); and that all these varying results and perplexing operations are only to be got at by vast expense and vexation—with these facts before our eyes, I say, it is not, I think, an uncharitable conclusion to arrive at, that the temptation of forming a costly establishment with the number of offices to which these different Codes of practise were to afford fees, and of

which the founders were to have the patronage, must have completely kept out of view the interests of suitors and of the public.

15. To descend however a little more into detail, and show how the practise of the Court works. In Equity, as is well known, the plaintiff brings his case before the Court in what is called a Bill, which first of all states his grievance, and then proceeds to charge the defendant with any pretence for resisting the claim which his ingenuity may suggest, (for plaintiffs are not limited to the truth of what they advance, and many Equity draftsmen defend the introduction of falsehood into this part of the case), and it then proceeds to interrogate the defendant minutely on every species of knowledge which he may have of the matter under dispute. It may be easily conceived, that a document of this nature may run to any length, especially as the fees and costs of those who prepare it *depend upon the number of words* which can be heaped into it.

16. The first consequence of this mode of commencing the suit is, that the defendant who, fortunately, is bound to make his answer upon oath, requires a long period to answer each interrogatory in the bill, and as his object even when a bonâ fide litigant is to tell as little as possible that may injure himself, it usually happens that, when his answer is forthcoming, it evades to give the very information which the plaintiff has sought. Hence arises the necessity for further questioning on the part of the plaintiff, always be it observed in writing, (amended bill), further fencing on the part of the defendant in answer, and so on backwards and forwards for many months or years, till so much time, trouble, and money are expended, that even on the best administration of the system, as in England, it is in evidence* that nine causes out of ten are driven to a compromise. *(a)*

* Report of Committee of the House of Lords on additional Vice Chancellors, 1841.

17. It follows from this procedure, that even when a party is honestly contesting a suit, from 14 to 18 months are consumed before the case is ripe to be brought before the Court, (an operation which, in most instances, is merely ancillary to putting the cause into a train for inquiry in the Master's Office); but if the defendant is dishonest as well as adverse, there is scarcely any period which can be assigned as a limit to his power of harassing his opponent. An illustration of this may

(a) That is to say, the party having a good case and undoubted claim, is induced to sacrifice a portion, in order to buy off the vexatious opposition of his opponent.

be afforded by the Minutes of Proceedings in the following case, which fell to my lot to dispose of finally last year, after a litigation of ten years and a half, and which I had to analyse carefully in order to ascertain where the costs should fall.

Poonja Conja v. *Abdul Rahim Khan.*

18. In 1830 a Horsedealer at Bombay died, having left a Will by which he constituted the defendant his Executor, who entered upon the Testator's property, and collected his assets. The plaintiff having a claim against the Testator of between 2 and 3,000 Rupees, applied to the defendant for payment of his debt, and at all events for an account of the Testator's assets, but the defendant refused both one and the other. The plaintiff was therefore forced to file his bill against the defendant in the Supreme Court for an account, and for payment. Three months afterwards the defendant put in his answer, and, *admitting the plaintiff's claim*, alleged that he had no assets of the Testator, &c. &c.

This answer, which was clearly insufficient in witholding important information, was excepted to, and on argument a further answer was ordered. On the second answer being put in with the information in question, a clue was given to the plaintiff of facts, by which he was enabled to draw an amended bill, putting further inquiries to the defendant "for the purpose of scraping his conscience", to quote the language of an old Equity Draftsman before the House of Lords, and at the end of more than a year from the commencement of the suit, an answer to the amended bill was put in. This answer enabled the plaintiff to scrape the defendant's conscience once more, and then with further answer, replication, &c. the cause became at issue in about 21 months from the commencement of suit.

Witnesses had then to be examined on each side, and in about two years more the cause was brought into Court, when a decree was made referring it to the Master's Office to take an account of the Estate of the Testator come to the hands of the Executor, and of the amount due to the plaintiff.

A long litigation of nearly four years took place on these points in the Master's Office, when a report was presented altogether against the

defendant. This report was excepted to by the defendant, but all his objections were overruled, and the cause on further directions was again referred to the Master for an additional inquiry.

Another long litigation in the Master's Office again took place, of nearly three years, when another report was presented alike adverse to the defendant, who again excepted to it, and again had all his objections overruled. And finally in June 1842, a decree on all points raised by the defendant was made against him, when a further controversy was raised by him as to his non-liability to costs on the ground of being an Executor? *(a)*

19. The course of procedure in the above case may perhaps be more readily understood by the following list of dates:

December 1830,	Claim for payment.
4th January 1832,	Bill filed.
21st April 1832,	Defendant's answer.
17th May 1832,	A better answer.
10th October 1832,	Amended bill.
1st February 1833,	Defendant's answer.
30th May 1833,	Amended bill.
20th August 1833,	Defendant's answer.
25th September 1833,	Replication.
5th October 1833,	Rejoinder.
14th November 1835,	Cause argued, and reference to Master decreed.
24th July 1839,	Master's Report made.
8th August 1839,	Exceptions by Defendant.
23d September 1839,	Exceptions overruled, and further reference to Master decreed.
30th May 1842,	Master's 2d Report.
10th June 1842,	Exceptions by Defendant.
27th June 1842,	Exceptions overruled.
30th June 1842,	Final decree for Plaintiff, and Defendant cast in costs of suit.

(a) Justinian lays down in one of his edicts, Cod. III. 1. De Judiciis. tit. XIII. that the blame of suits 'pœne immortales' lies with the Judge, "hoc etenim judicialis magis esse potestatis, nemo est qui ignoret; nam si ipsi noluerint, nullus tam audax invenitur, qui possit invito judice litem prqtelare." But the only power which a Judge has, in the present English

20. If the case above cited had any extraordinary circumstances connected with it, it might be safely passed over as anomalous; but it is not so, it was a mere debtor and creditor controversy, and under a simple well regulated system of procedure, it ought not to have lasted more than six months. If the plaintiff and defendant had appeared in Court on the first day of the suit, it would have been evident that a decree referring to the Master must be made, and three years and a half of litigation would have been saved at once, and if the witnesses had been produced in Court on any day or days after the first six months, all the facts on which the case subsequently turned might have been proved, and the same decree made, which it cost ten additional years under the present practise to obtain.

21. As I am discussing now merely the initiatory proceedings of a suit which tend to bring the case before the Court, I will not touch upon the Master's Office, where the cause in its further progress so constantly becomes engulphed; but I have already stated enough to make it apparent that the ordinary procedure of a Court of Equity even between bonâ fide litigants, with its machinery of written pleadings and written evidence, necessarily involves an enormous expenditure both of time and money; and that when either of the parties is dishonest or vindictive, he has the power of harassing his opponent and protracting the suit almost without bounds.

22. In reprobating Equity practise, however, so strongly as I do, I by no means wish to have it supposed that I desire to supersede it by that of Common Law, or to make special pleading the channel for bringing controversies before the Court. On the contrary, I think it wholly unsuited to the country. A creature of English Lawyers and arising out of the simple vivâ voce pleadings of suitors at the bar, it has shaped itself at home into perhaps not an ineligible mode of trying certain questions, but wholly with reference to the peculiarity of the tribunal before which it is employed. All the rules of special pleading which have been framed with reference to any definite object, have had in view the separation of the law from the facts, so as to enable the former to be disposed of by a tribunal sitting in one place, and the latter by a different tribunal sitting in another. The facts having to be tried by a jury, who are collected at some trouble and expense from different parts of the country, and who can only be held together for a limited period

system, of repressing dishonest litigation, consists in the infliction of costs, which often, as in the case in the text, turns out mere "brutum fulmen."

of time, it naturally became an object to reduce the issues to be tried to the narrowest possible point on which the parties could be content to fight the question. Juries also being composed of men caught at random, and in whom the accomplishment of reading even was not considered a *sine quâ non*, it became further desirable not to complicate the record or to bother their brains with more than a single question. Hence the various rules having these objects in view. But it is needless to observe on the total inapplicability of any one of them to a Court which combines the provinces of Judge and Jury, to a Court permanently fixed, which has no duties to call it away to private business at a distance, and which therefore may sit *de die in diem* to dispose of every question that may fairly arise in the case, to a Court, finally, composed of educated Lawyers, who, it may be taken for granted, would not object to a party bringing forward his case in a double aspect, i. e. in two different forms when such a course is legitimately founded on the facts. The application of special pleading to the trial of facts in this country, I believe, to be in its results as follows; that often the true point in dispute is not elicited at all; that often the law and the facts are so jumbled up together, that a hasty decision is called for from the Judges on the former, and which, after being pronounced, it is too much to expect from the fallibility of human nature, can be easily made to appear wrong to the tribunal who pronounced it; lastly, that when it does enable cases to be tried on the merits, it condemns the losing party to 1,200 Rupees costs, and that even when he does not defend the action at all, it condemns him to 450.

23. I will dismiss this part of the subject by observing, that an artificial system like special pleading, when much cultivated by a learned profession, naturally grows up into a sort of science, to which the cultivators of it both on the bench and at the bar become attached in all its ramifications and subtleties, so that in their anxiety to see the system logically carried out, they will be constantly found losing sight of and sacrificing the merits of the case to mere discussions on the forms.

24. The same remarks are almost equally applicable to pleadings in Equity. But this natural tendency in the legal mind to aberrations from the main matter of judicial controversy is peculiarly dangerous in India, where it is impossible that any member of the profession can attain the same technical dexterity in mere form work as is possessed by special practitioners in the particular calling at home. Every English Lawyer in India has to learn the practise of at least one, and very often of three different Courts, on his arrival in this country. The Common Lawyer knows nothing of Equity practise or of that of the

Spiritual Courts; the Equity Lawyer knows nothing of the latter either, nor of the Common Law Courts, Civil or Criminal. Yet the Common Law and Equity bars furnish exclusively both Judges and Advocates. It is dangerous therefore for such a bench and such a bar to allow themselves to be led into astute reasonings on what possibly may be the practise at home; and the desirableness of having a simple Code of their own, so that all their faculties may be directed to the great principles of jurisprudence, becomes more than ever apparent.

25. The question, then, presents itself as to what system can be suggested to replace the cumbrous one now existing in the Supreme Court, and which is here alleged to be so vexatious? It appears to me that there are two, both of which in comparison with the existing system stand highly recommended by principles of common sense, and by what is of more value in the eyes of many, common experience. The first is that adopted by the Supreme Court at Gibraltar, which, under the late Charter of 1830, giving all judicial functions to the establishment there, and referring, like the Indian Charter, to the existence of English law, have adopted one simple system of procedure on all sides of the Court, ordering that on civil questions, whether legal or equitable, the proceedings shall be by petition, answer or demurrer, that the examination of all witnesses shall be vivâ voce, and that the law proceedings shall go on throughout the year, the terms including a space of eight months.

26. The second system capable of adoption has, by some, been termed the natural system. By it, the pleadings of the parties are, in the first instance, oral, and the task of reducing them to form belongs to the Officer of the Court. The parties themselves are present before the Judge and are amenable to examination at any stage of the inquiry. This system is in some degree the old practise of the Common Law Courts in England, is mainly adopted in all Courts erected for the poor who have no money to dispose of in fees, of many modern Courts erected in the Colonies, of which West Australia may be cited as an instance, and has been acted upon in the Small Cause Court at Bombay for upwards of forty years.

27. Between these two systems the preference to be given to the latter is based on so many solid reasons, that I do not think they can stand in competition with one another for a moment.

28. The petition and answer system of Gibraltar has uniformity and simplicity to recommend it. Any one can draw a petition. No

inveterate forms oppose themselves as obstacles to prevent the Judge from finding his way to the facts in the case. Still, it must not be concealed that this mode of procedure contains within itself all the inherent defects of Special and Equity pleading. The suitor's story is not told by himself, but by his legal adviser. Hence arises all that large expenditure which we have seen is created before the case is brought into Court; an expenditure in the great majority of cases (those where the defendant does not intend to contest the claim) altogether useless. Hence also arises the imperfect statement of the case, filtering as it must do, through different channels and languages. Hence, the delay and power of vexation which so temptingly offer themselves to defendants by their ability to call in legal astuteness to assist them, and thus, without a perpetual watchfulness on the part of the Judge, all the abuses might spring up which have been shown to occur in the existing systems.

29. On the other hand, none of these objections can be raised against oral pleadings where the parties come into Court in the first instance, and mutually state their case and defence under all the sanctions that publicity, mutual confrontation, and the presence of the Judge can inspire.

30. This system was pursued by that very able Judge, the late Sir Benjamin Malkin, at Singapore, as described by him in his letter on the Government Records (dated 16th September 1837;) and has been already alluded to in some of the Reports of the Law Commission as desirable to introduce into the Mofussil Courts. The approximation towards it in the practice of the Small Cause Court at this Presidency, in the adoption of the two main features, examination of the parties, and references of all technical errors in the pleadings to the jeofail or error of the Clerk, is so signal in reducing expenses and bringing the facts of each case to light, that I have no hesitation in pronouncing it by far the most useful portion of the Court. And I believe I am corroborated in this view by the opinions of the ablest Judges who have sat here, as well as by the popularity with which it has always been regarded by the public.

31. As the elements of the suggested new procedure exist, therefore, at Bombay, nothing would be more easy than for the Legislative Council to bring all civil litigation within it. A few enactments like the following would probably be sufficient to launch the system.

1. All suits shall commence on the personal application of the party to the Judge, on oath if required, and a summons, or capias, shall thereupon issue.

2. On summons, &c., being served, the parties shall attend before the Judge in open Court, and if any matter shall appear to be in dispute, a day shall be fixed for the hearing, and the proceedings in the suit regulated.

3. All evidence shall be given vivâ voce, and the parties to the suit shall be examinable on oath at any stage of it ; but in certain cases to be regulated by the Judges, the presence of witnesses, and parties, may be dispensed with, and evidence may be received in a written form.

4. In every case the Court shall decide on the principles of Law or Equity arising out of the facts without reference to the form of suit.

5. All cases shall be decided on the merits, or adjourned till further facts can be procured to enable such decision.

32. I am unwilling to take up the time of the Law Commission by extending this already long paper with details as to how this system could be made applicable to *all* the civil controversies which come before the Supreme Court ; or by pointing out the rules which would have to be framed by the Judges so as to secure

1. Authentic records of proceedings when necessary.

2. The safe conduct of causes which require length of time for investigation.

3. Application of the machinery of the Court so as to secure the interests of parties during the progress of the suit.

4. Arrangements by which the expense and dilatoriness of the Master's office may be avoided.

33. These important points require great length for discussion, and I only mention them here to prevent the supposition that I have failed to consider them in recommending the above simple forms of procedure.

34. Having thus given my opinion as to what the practice of the Court ought to be, I am now able, satisfactorily to myself, to answer the queries of the Law Commissioners. It will be seen that, according

to the plan proposed, more work is thrown upon the Judges than has hitherto fallen to their lot, and undoubtedly it enters into my scheme that one of the Judges should sit at least four days a week throughout the year. But, as I have shown, that at present not one-third of the Judge's time is occupied, and as I can safely say for myself, that a life of idleness in this country has no charms to recommend it, I do not anticipate any objections on this score.

35. These frequent judicial sittings, however, would dispense with a great portion of the work that is now done out of Court by the Master, the Prothonotary, the Examiner, and the Clerk of the Small Causes. Whatever judicial business is done by these officers, (and they all at present have some to perform) would be much better done, more cheaply done, and more satisfactorily done by the Judges in open Court ; and what is done by these officers in mere routine business would be, for the most part, abrogated by the simple procedure proposed. I conceive therefore that these four different offices might be abolished, or rather coalesced into one.

36. The business of such an officer, who may be called a Registrar, would chiefly consist in recording proceedings and in taxing the costs of parties. In Court his business would be to attend all the sittings of the Judge, to enter in a book the appearances of parties, and to fill up in printed forms their statements and answers, to swear witnesses, to take down evidence, when required, and to note the judgment of the Court. Out of Court his business would consist of little else than keeping his books in good order, in taxing the costs of parties and practitioners, and occasionally in hearing references from the Court that might require privacy or the leisure and quiet of a private room. I do not rate the attributes for such an office at any high standard ; but I think a legal education would be a most desirable qualification, and that the rate of pay should range from 1,500 to 1,800 Rupees a month. For such a salary, I conceive, that efficient services for the work required could be obtained.

37. But another standing officer connected with the Courts in India is required, not so much for the sake of the Court itself, as for the interests of the public which the Government have thought fit, by a very wise institution, to protect, I mean by the functions attributed to the Ecclesiastical Registrar of taking out Administration to the Estates of parties who may die in India without relations or friends.

38. The services required from this officer do not necessarily demand a legal education, and the holder of the office has frequently been a layman. But I think it very desirable, that both this office and the preceding one should be held by Barristers, and that they should be held conjointly, like the Masterships in the Court of Chancery and Queen's Bench for the following reasons. The duties of an Ecclesiastical Registrar by no means take up the whole of his time, yet as he holds a very responsible post demanding pecuniary security, it is expedient that the emoluments should be liberal, so as to secure trustworthiness. But as his time is not fully occupied, his post is one that may be well consolidated with some other. The Registrar or Master mentioned in para. 36, on the other hand, would have a greater portion of his time fully engaged, and as there is nothing disparate in the duties required from each officer, they might well be appointed as Masters or Registrars generally, and arrange between themselves for the discharge of all the duties coming into the office.

39. This last suggestion seems to be corroborated by another view of the case. From the circumstances of this country where health so frequently fails, and change of air becomes necessary, it is certain that the holders of these two offices, however distinct they might be, would often be called upon to assist and act for one another mutually, but the disadvantages of having an acting officer in a post, who comes in merely as a volunteer and without even professing any knowledge of the duties, need not be enlarged upon. On the other hand, if the two offices are consolidated, a degree of responsibility is ensured from both, and also something of emulation to obtain credit in the profession and from the public for an able discharge of duties, which, as may be seen in the case of the Masters in Chancery, is by no means a motive to action to be undervalued.

40. The appointment of two such officers would enable the following offices to be abolished, now held by four gentlemen.

1. Master in Equity.

2. Prothonotary, and Equity and Admiralty Registrar, and Examiner in Insolvent Court.

3. Clerk of the Small Causes.

4. Ecclesiastical Registrar and Examiner in Equity.

41. Another officer is still required by the Court to discharge the functions now performed by the Clerk of the Crown, the Clerk to the Insolvent Court, and the Pauper's Attorney, and as these offices are all filled by gentlemen in practice, I think that they may be consolidated into one office, which it might be made worth a practitioner's while to accept on giving up any extraneous practice. The work in each of the offices mentioned is appropriately Attorney's work, for although the Clerkship of the Crown has been usually filled by a Barrister at Bombay, it is generally held by an Attorney at home, and I think that an able man from that branch of the profession is better adapted to the office. The office might be termed the Clerkship of the Court, and I do not think that an efficient occupant of it could be ensured under Rs. 1,500 per month.

42. The Establishment of the Court, therefore, according to the plan proposed, would stand thus:

Two Masters or Registrars at Rs. 1,800 each,.....	3,600
Clerk of the Court,.....	1,500
	Rs. 5,100
Amounting per annum to	Rs. 61,200
To which has to be added for the Sheriff's Salary, ...	4,200
	Total Rs. 65,400

43. But as the present salaries payable by Government to the Officers of the Court only amount to Rs. 36,840, if this long paper is to end by a recommendation of further drains on the Treasury in support of the Court, I fear that it would meet with but little favour, and it is necessary for me to show that direct advantages would accrue to Government from its adoption as well as the indirect ones which they would experience in the lessened charges to the public on law proceedings and litigation.

44. It will be seen that the fees payable to the Officers of the Court amount at present to Rs. 84,143, but this item is probably insignificant when compared with the costs paid by suitors to their Attornies for useless procedure; the greater portion of these amounts will be saved by the plan suggested, and on a comparison with the costs of suing by a simple method, such as is used in the Small Cause Court, I

conceive that the expences of litigation will be reduced to one-tenth of the present amount.

45. But although this great benefit to suitors seems attainable, there seems no reason whatever why a portion of the expences of the Court should not be thrown upon them. In countries like England when the taxation is ramified so as to reach every individual, the support of judicial establishments is the service rendered by Government as the equivalent *quid pro quo*. But in Bombay the mass of the population is scarcely taxed at all—a money making, money saving community, but unconnected with land, they can scarcely allege that a single pie of theirs finds its way into the Government coffers. In all fairness therefore an amount may be levied from suitors as for the article law, as much as for any other article of which they might stand in need. But a fee of only ten Rupees each on the institution of a suit would on the number of causes entered last year produce Rs. 14,400, and the fee might be raised to fifty Rupees without its burden being sensibly felt.

46. In addition to such fund as a means of supporting the Court, there would have to be added the commission now levied on the Estates of deceased parties, and which finds its way into the pockets of the Ecclesiastical Registrar, and private Administrators. If the latter officer is to be paid by Government such commission would of course be rightly payable to the Government Treasury, and if all private commission, as now allowed, were abolished, I am convinced that the total amount now received by the Registrar, would accrue to the Government chest, even if the commission were reduced by one-half.

47. The funds applicable to the Court would stand thus, therefore:

Salaries now payable, ...	Rs.	36,840
Institution fee on suits, ...		14,400
Commission on Estates of deceased parties, ...		18,957
	Rs.	70,197
Salaries proposed to be paid, ...		65,400
Balance in favor of Government, ...	Rs.	4,797

48. Whilst upon this subject I would venture to suggest that there is another fund which appears to me to be largely applicable to the maintenance of the Court—I mean the unclaimed Estates, to the amount

of eight lacs of Rupees, in the hands of the Ecclesiastical Registrar. A great portion of this fund is of long standing, and may with certainty be predicated as never likely to find a claimant. An Act of the Government dedicating the interest on the fund to the support of that Court, which has created and preserved it, seems to be founded on the clearest principles of justice and expedience.

49. I cannot close this long paper without first of all apologizing for the great extent to which it has run, and secondly, a frank disclosure of the feelings with which I have gone into the inquiry. I beg to assure the Commission then that I have looked at the question proposed without any reference to the existing interests of the Judges, or of the present Officers of the Court. The former are not indeed likely to be affected by any change, except so far as a little additional work may be thrown upon them, but the latter stand in a different position, I have therefore treated the question unreservedly, and entirely as *res integra*, but I have done so under the firm conviction, that in any change to be made, existing interests will be fully protected by the justice of the Government of the present day. On this point and on such an inquiry the duties of the Judge are so well and so feelingly expressed by Lord Stowell, that I make no apology for transcribing the passage, which I have had in my mind throughout the whole discussion:

"I trust I need not profess to bring to this discussion at least the dispositions which ought to meet it, an anxiety to attend, on the one hand, to those considerations of public utility, in which the real honor of the Court is so deeply involved, (for it can have no honor independant of its subservience to public utility,) and, on the other hand to those sentiments of a liberal, and even kind justice, which it is bound to feel towards those immediately employed in exercising its functions. It would be a gross dishonesty to lose sight of the public utility from an undue partiality to individuals; but it would be a dishonesty not less base, nor less detestable in the motive, to sacrifice rights which the Court is bound to protect, to any pursuit of an unjust and therefore transient popularity."*(a)*

E. PERRY.

Bombay, 3d June, 1843.

(a) Case of the Rendsberg, 6 Rob. Adm. Rep. 145.

G. H. Huttmann, Bengal Military Orphan Press.

Bombay, 4th August, 1843.

To the Hon'ble C. H. CAMERON, Esq.,

And the Members of the Law Commission,

&c. &c. &c.

Hon'ble Sirs,

I regret that ill health and an unusual pressure of business have delayed my reply to your letter respecting the Officers of the Supreme Court at Bombay, their fees and emoluments. Sir Erskine Perry, however, has already sent to you an abstract, briefly shewing the average annual amount of emoluments received by each Officer of the Court. We think you should also be furnished with the Returns from which that abstract was made out, and accordingly I have the honor to forward them, together with the "contrasted Statement of Fees" which we received from you, and which has been filled up by the Officers of the Court here in the manner you requested.

It will be observed, that there are many fees receivable at Calcutta which have no existence at Bombay. In some instances the fees charged at Bombay are higher than at Calcutta, but such fees appear in general to relate to services which, at Bombay, are seldom called for, and considering that the folio at Calcutta contains but 72 words, whilst at Bombay it contains 90 words, it appears to me that, on the whole, the fees at Bombay are much lower than those at Calcutta. In the few instances in which fees of Officers of Court for particular services are higher at Bombay than at Calcutta, the fees established at the former place may well be reduced. The fees of Attornies at Bombay, it seems to me, are in some respects too high, and it is not improbable that Sir Erskine Perry and I may cause them to be reduced without delay.

I am not aware how any consolidation of offices can be effected. Giving a plurality of appointments to one individual can scarcely be called consolidation. Such a measure is sometimes expedient in order to remunerate a party for devoting his services exclusively to offices in the Court, and occasionally, two or more appointments are given to one person, or after having been held conjointly, are again severed, with a view to suit the abilities of individuals, and otherwise to promote the public service. Perhaps by giving the custody of the Seal to the Protho-

notary or some other Officer, a reduction in the Sealer's fees might be attainable.

Sir Erskine Perry and I perfectly concur in the opinions expressed in his letter to you of the 29th of June, respecting the office of Sheriff. I would add, however, that although the High Sheriff in this country appears to me to be almost wholly useless, the services rendered by the petty Sheriff are obviously indispensable. They could not be obtained from the description of person generally appointed to be High Sheriff, but might well be discharged by a person of the same rank in life as that from which the Deputy Sheriff is usually selected, and such officer might be denominated The Sheriff.

I would gladly agree with Sir Erskine Perry in all the particulars contained in the Minute which accompanied his letter of the 29th of June, and am fully convinced that the expense of litigation is very great and ought to be diminished. That expense, Sir Erskine Perry thinks, has occasioned a decrease of business in the Supreme Court whilst the amount of business in the Courts of the East India Company has increased. The supposed decrease of business in the Supreme Court is scarcely established by the Schedule of cases heard and actions tried during the years 1840, 1841, and 1842, transmitted to you along with the Minute, for according to such Schedule the amount of business in the last mentioned year exceeded the amount of business in either of two preceding years, and it may be added, that during the two terms which have already occurred in the present year, thirty-four actions have been tried.

I cannot assent to the commonly received doctrine that the natives of India are of a more litigious character than the rest of mankind, and I believe they are not more litigious than the Irish or Welch. Where the administration of justice is comparatively certain and equable, rights will be resisted or withheld less frequently than under a more imperfect judicial system, and thus, without having recourse to the difference of expense attendant on litigation in the respective Courts, I can well understand why there should be comparatively less business in the Supreme Court than in the Courts of the East India Company, if such be indeed the case, and why there should be more litigation in India than in England. My own conviction is, that there is now nearly as much business in the Supreme Court at Bombay as there has been at any time during the last ten years, and the opinion is upheld by the annexed Schedules marked A and B, which I have received from the Prothonotary of the Court.

From the records of the Court and other documents it may be collected that on the arrival of Sir Edward West in this country, and at the establishment of the Supreme Court at Bombay, an arrear of supposed wrongs and abuses was brought forward, and in his efforts to right the former and correct the latter, Sir Edward West raised, as was to be expected, a hornet's nest, and his own feelings and those of other Judges in turn became excited. The Court took cognizance of one or two matters respecting which it had no jurisdiction, but between suits in which the Government was interested and suits amongst private individuals, the business of the Court has never been so great as it was from the time when the Court was first established up to the year 1825. And yet at no period was the cost of litigation so great as during that abundance of business. There were then only three or four Barristers, and the number of Attornies was likewise much too small. The Bar thus had a monopoly; every Member of it had employment, and I have been assured, and believe, that immediate fees, if not exacted, were necessarily given. At the same time, as the records of the Court show, amendments, applications for time, insufficient answers, exceptions and other dilatory and expensive proceedings were multiplied, and the cost of litigation proportionally enhanced. At length a greater number of Barristers obtained licenses to practice. There was a struggle for subsistence. The rate of fees fell considerably, and, to the advantage of clients, professional jealousy arose. Thus the expense of litigation was decreased, and yet the amount of business was diminished. This may be accounted for by considering that much of the original arrears may, by that time, have been disposed of: that the Insolvent Act came into force; that Sir John Grant had for a period shut up the Court, and that it was re-opened under peculiar circumstances, and latterly, the stagnation in the China Trade, and in mercantile affairs in general, must have had considerable effect. Still, as already observed, I believe there is now nearly or quite as much business in the Supreme Court as there has been on an average during the last ten years, and disputes between petty traders and money lenders on a small scale are, or ought to be, disposed of in that branch of the Supreme Court called the Small Cause Court, and in the Court of Requests.

But the expense of proceedings in the Supreme Court, properly so called, is great, and should, as far as is practicable, be diminished. The cost of litigation in a great measure arises from its being for the interest of professional men to protract the pleadings, and to multiply incidental proceedings. I have often thought this evil might, in some degree, be remedied by intrusting the framing of pleadings to an Officer of the Court. Such is the practice, though, in my opinion, very imperfect in

the Small Cause Court at Bombay, but the system might be considerably improved.

It might be advisable to give to parties the option of preparing their own pleadings, providing, perhaps, that no greater costs should thence accrue between party and party than if the pleadings had been framed by the Officer, and that professional men should be paid, not in proportion to the seeming work and labor done, or the length and number of the pleadings, but by a fixed sum for each stage of the business. Special pleading so far as its abuses are concerned, might be discarded, but retained so far as it is essential to conducting logically the altercations of the parties. It seems to me that thus far special pleading is as much suited to this as to any other country ; that thus far the rules of pleading are merely conformable to the operations of the mind in the logical management of a dispute, and that by following any effectual rules for that purpose, law and fact would be necessarily evolved and separated. Unless where the pleadings were very special and unusual, it should be unnecessary for the Officer to do more than make a minute or entry in the terms of the marginal notes annexed to pleadings in the books now in the hands of the profession. At present, even on a trial for murder, the Officer enters the plea and replication by the mere words "Non cul." "Culprit." Such Notes or Minutes might afterwards be expanded into the formal pleading at full length if necessary, though it appears to me that such formality should seldom be required, and that even in making up the record, a brief statement of the declaration, bill or libel, concluding with a taliter processum fuit, and the judgment should, in most cases, be sufficient.

I greatly doubt whether a Judge should be permitted to interfere in the conduct of the suit before it becomes ripe for trial or hearing, otherwise, or with any further or other intent than his interposition is at present allowed. Any more extensive interference on his part might tend to bias his mind in an early stage of the suit. Were he to preside at the oral wranglings of the parties, and to superintend the making entries or minutes accordingly by way of pleadings, his authoritative position would indeed invest him with coercive power ; but through excess of zeal or infirmity of temper, when provoked by tricks and stratagems of suitors, he might have recourse to measures of a severe character, or admissions might in effect be extorted. Any impatience or indolence on his part might also produce much mischief. With respect to all such matters he might exercise due restraint over another, a Subordinate Officer, more easily than over himself : and a professional Officer of the Court, possessing ordinary skill and experience, could

hardly fail to conduct the allegations, pleadings and other interlocutory proceedings in an efficient manner, especially as he would be subjected to superintendence and control—important checks from which the Judge, in this country, would be comparatively or wholly free.

Measures for similar objects, adapted to the conduct of suits in Equity, or respecting matters of Ecclesiastical or Admiralty jurisdiction, might be devised. The interrogating part of the Bill might be omitted in the first instance, and if the defendant's answer were to be taken by an Officer of the Court (the defendant not availing himself of an option to put in his answer by the aid of Solicitor and Counsel, as under the present system) the Officer might orally interrogate the defendant, consistently with the scope and spirit of the Bill, and the replies being committed to writing would form the answer. Omissions or defects might be supplied by additions to or amendments of the Bill, and by interrogatories oral or otherwise.

It seems to me that witnesses in suits in Equity should be examined orally in Court as in a trial at Law. I am aware however that opinions of great weight are to the contrary.

Where in an action at Law a point in Equity arises upon the pleadings or evidence, without any surprise to either of the parties, it appears obvious that the Court should be empowered to decide it at once.

The above are some of the speculative notions I have at different times entertained upon these subjects. I only enter upon or allude to them now, because these topics have been fully dwelt upon in the copious and able Minute of Sir Erskine Perry, and were I wholly silent regarding them it might appear that he and I differ more widely than is really the case. If it should be intended to effect any radical change in the mode of administering justice in the Supreme Courts in India, it may be expedient to consider such matters more fully, and to enter into details suitable to a new system. At present I am not aware that any such complete innovation is contemplated; and as some persons might consider sweeping alterations of the long established practice in the Supreme Courts equivalent to an abolition of such practice, and as amounting in spirit to a partial abolition of those Courts, and to the establishment of new tribunals, it may be doubted whether the Legislative Council can be competent to effect such alterations under the 3d and 4th Wm. IV. Cap. 85, Secs. 43 and 46, without the sanction of the Authorities in England.

The result of such measures as Sir Erskine Perry advocates, and as I have alluded to in this letter, would be, I fear, the annihilation of the Bar at each Presidency. At all events Counsel would seldom be employed in any case. Consequently Judges might become arbitrary, and by degrees, perhaps, professionally ignorant, and the due administration of justice would depend much more than even at present is the case in this country, upon the personal characters of those placed upon the Bench.

I have the honor to be,
Hon'ble Sirs,
Your most obedient Servant,
H. ROPER.

Hon'ble C. H. CAMERON,
„ F. MILLETT,
„ D. ELIOTT, and
„ H. BORRADAILE, Esqrs.,
Law Commissioners.

Hon'ble Sirs,

We have the honor to state in answer to your Letter addressed to us No. 13, of the 27th May 1843, that our opinions on the consolidation of Offices in the Supreme Court at this Presidency and the amount of Salaries, are contained in the Minute of the Chief Justice, which is annexed to this Letter, and that his Minute may be considered as embodying the opinions of the Judges of this Presidency upon the changes which it would be desirable to introduce in the administration of Justice here which on the Equity, Ecclesiatical and Admiralty sides admits we think of great inprovement, and is also susceptible of improvement on the plea or common Law side. The consideration of these subjects appeared to us to be so intimately connected with the proposed revision of the Establishment of the Courts that we need offer no apology for entering upon it in our answer to the Letter which you did us the honor to address us. We regret that the absence of the Chief Justice in the Spring and Summer of last year, and the subsequent pressure of business in the Court, have delayed for so long a time our reply to your communication.

We have the honor to be,
Hon'ble Sirs,
Your most obedient Servants,
LAWRENCE PEEL.
J. P. GRANT.
H. W. SETON.

Court House,
The 13th February, 1844.

MINUTE OF THE CHIEF JUSTICE.

The amount of the emoluments of the principal Officers of the Court has been fixed with reference to the emoluments derived from practice at the Bar here, which are much higher than at the other Presidencies. A Barrister in the Supreme Court here, who has made any advance in his profession, naturally looks to the receipt of a large professional income at an early period. It has been thought of late years by the Judges to be desirable, if not essential to the due administration of justice, to obtain in the two principal Offices of the Court as at present constituted, viz. those of Master in Equity and Registrar, the assistance of Gentlemen of the Bar in practice, and the salaries and emoluments of these higher Officers were fixed in the scheme, contained in the letter of the 14th September, 1842, from the Judges of the Supreme Court at this Presidency to the Honorable the President of the Council of India in Council, on a liberal though a reduced scale proportionate to the emoluments of practising Barristers in the Court. The emoluments of one of these Officers, the Registrar, are now wholly derived from his Commission as Administrator of Intestate Estates, for which as it has been before noticed in the Judges' letter, the Court was not at any time responsible. These are not a burthen on the Estate, and the charge on the parties interested is precisely the same as that which falls upon them under non-official Administrations. It is, however, desirable in my opinion to lessen this charge in both classes of Administrations. Upon the present plan of administering Equity, the Master is in some mode a Judge, and his Office is one at once of great importance and of some dignity. If a vacancy occurred in my time whilst this Office was on its present footing, I should be very desirous of selecting for it amongst the Barristers in practice, the best qualified for such an Office of those who would consent to take it. It was with this feeling that a salary so high as Company's Rupees 4,000 per month was named in the scheme in conjunction with that Office. But it is to be observed that that was meant as the maximum, which the Judges should be empowered to offer ; and that it would be their duty to propose a smaller salary if the smaller salary would secure the services of a Barrister in practice well qualified for the Office. Upon re-consideration of this subject I am disposed to think that a salary somewhat less than the one proposed in the scheme referred to would enable the Court to secure the services of one so qualified. It is difficult to say before hand what salary would suffice; but I think that a salary of 3,500 Company's Rupees per month, or perhaps 3,000, would be sufficient to induce the relinquishment not of the first practice but of a moderate practice at the Bar ; in the scheme before referred to the union of the Taxing Office with that of Master

was proposed. The Judges were not at that time apprized of the objections to this union which were entertained by the profession. The taxation of costs if delayed by the Master's attention to the proper duties of the Master's Office which would frequently happen, would delay the issuing of execution to the serious injury of the suitor; and therefore this particular change was considered by the Judges as not desirable to be adopted. On the death of Mr. Vaughan, the late Taxing Officer, the Judges with a view to accelerate the abolition of the Office of Sworn Clerk would have urged Mr. O'Dowda to accept the Offices vacant by Mr. Vaughan's death, but for the objection that the appointment of Mr. O'Dowda would have excluded the Attorneys wholly from the Offices of the Court. The Judges were reluctant to establish such a precedent, and the Chief Justice waited upon the Hon'ble the President of the Council for the purpose of laying before the Government the alteration in their views; and in a personal communication with him stated the course which the Judges were desirous of pursuing, and informed him of the reasons by which they were influenced. The President of the Council suggested that the Gentleman to be appointed Mr. Vaughan's successor in the Taxing Office should be informed that his Office was to be held subject to any arrangements that might be effected for consolidating Offices and reducing the Establishment of the Court, and that proposal was acquiesced in, and Mr. Ryan who being properly qualified for the Office was selected for it amongst the Attorneys of the Court in consequence of his loss of the Office of Sealer, which was abolished on Sir Edward Ryan's resignation of the Office of Chief Justice, accepted the Office on this distinct understanding. The reduction effected upon his appointment was to the extent of Company's Rupees 9,000 per annum. This is the only instance in which any vacancy has occurred since the date of the Letter of September 1842, and although the Judges then effected a less reduction than they had hoped to do when they addressed that Letter to the Government, it must not thence be inferred that their desire to effect all practicable reductions of the cost of the Establishment at the earliest period has suffered any abatement. The Judges have made no further effort to reduce the Fees of Court in consequence of the Letter referred to not having been replied to by the Government. They are not officially acquainted with the views of the Government relative to the proposal that the Government should permit the reduction of some part of the Fees of Court of which the Government are now the recipients.

Having given this answer to the general enquiries contained in the Letter of the Law Commissioners concerning the further reductions or steps to further reductions effected or taken since the date of the Letter

of September 1842, I proceed to consider some of the proposals in that Letter as to changes in the Establishment of the Court.

I am not sufficiently acquainted with the mode of transacting business in the Office of the Accountant General of the East India Company to form any opinion whether inconvenience would result here from adopting the practice prevalent at Madras and Bombay. The amount of business in the Supreme Courts at those Presidencies, and the amount of monies in the hands of the Accountants General of those Courts is, I believe, considerably less than in the Supreme Court of this Presidency. The double machinery now in use seems to be objectionable. The Court must have an Accountant; the Accountant General of the Company if he were the Accountant of the Court, would be subject to the general jurisdiction of the Court over him as its Officer. This might be deemed inconvenient. It has been suggested by the Master of our Court that the simplest course would be to retain the Office of Accountant on its present footing, and to make the Bank of Bengal the Bank of the Court in like manner as the Bank of England is the Bank of the Court of Chancery. Upon this subject I expect to receive shortly a Report of the Master, which shall be forwarded to you as soon as it reaches me. I think there is no necessity for retaining the Offices both of Sheriff and Deputy Sheriff, and that the Sheriff's Office should be filled by a permanent Officer. That Officer, though subject to the Court, is not strictly speaking an Officer of the Court, and I know not to what Office of the Court the duties of the Sheriff could be assigned. I see no reason why the Office of Sheriff should not be united to that of Coroner. The present Coroner is not a Lawyer by profession, but he is not by any means uninformed on the subject of Law; and I had lately submitted to me some observations of his on his own Court, and its legal functions, which shewed that he had mastered that branch of the Law, and I have no doubt that a person of his intelligence and habits of study would readily qualify himself to discharge the duties of Sheriff. In general, however, I think it would be preferrable to select a Lawyer for the Office. If this arrangement took effect, I think that all process out of all Courts within the local jurisdiction should be executed under one and the same Officer, and issue from one and the same Office. Fewer abuses would prevail, and it would be the cheapest mode of executing process. The charges of the Office would probably be covered by a moderate poundage or fees.

It is necessary that I should preface my plan of reduction as contained in this letter by a few remarks on Establishments of Officers in Courts, when confined to their proper functions: and on the union of judicial functions or of functions, the exercise of which has no necessary

connection with a Court, with the proper functions of such Officers. The Establishment needed for a Court is that of Officers having duties of a ministerial character to discharge in the various stages of a suit; as issuing the first process, seeing that it is in the legal form, and has the proper vouchers of its genuineness, and issues under the prescribed checks against abuse, recording its return, filing the proceedings as they go on, attending at the hearing or trial, taking the evidence when essential, entering in proper form the proceedings of the Court, taking accounts and conducting enquiries of a protracted nature which would otherwise unnecessarily occupy the time of the Court, and if taken in Court would materially enhance the expenses of a suit. When the forms of Courts are simple, these duties require no great degree of professional learning. Where duties of a judicial or *quasi* judicial character are assigned to such Officers it is a defect in the system of administration of justice which is generally owing to the necessity of some such delegation in consequence of the pressure of business in Courts. It seems to me that some of the matters usually referred to the Master might either be decided in Court without a reference, or be decided by one of its own Members sitting as a Judge in Chambers. It would make this Minute of undue length if I were now to go into details. I have however annexed to this Minute some observations on the general improvements of the judicial system here which will serve to illustrate my plan. Next as to the delegation to the Officers of the Court of duties not necssarily connected with a Court. Of this kind in our Court are, first, the official Administration of the Estates of Intestates conferred by command of the Legislature of Great Britain on an Officer of the Court, the Ecclesiastical Registrar. Next the Receivership which commonly falls on an Officer of the Court by the consent of the parties in a suit, but it is not of compulsory obligation on the parties to select an Officer of the Court for such purpose, and lastly, the Official Trusteeship lately created by an Act of the Indian Legislature. All the duties of these various Officers are those of ordinary Administrators, ordinary Receivers and ordinary Trustees, and they have no necessary reference to any suit whatever. In my opinion it would be the better course to retain the offices; but to disconnect the person discharging them from the Court and to transfer the appointment of him to the Government and to confine the Court Establishment to the Officers really necessary for the discharge of the ministerial duties before mentioned, I think it is of importance that no offices should exist as connected with the Court which are of an administrative character and have no necessary connection with proceedings in Court. It creates false impressions that Officers are superintended in the discharge of such duties by the Court when they are not, and cannot, from the very nature of the case, be so superin-

tended. Should breaches of trust or duty arise in the discharge of such administrative duties censure would fall upon the Court for that which it could not by any vigilance prevent; and in short in cases where the Court could not judicially interfere even if it had knowledge of errors committed in the discharge of such duties. I proceed now to state my views as to the Establishment of the Court on the assumption that a uniform and simple form of procedure were adopted in the Supreme Court on its Plea, Ecclesiastical and Admiralty sides, and that the business on the Equity side were conducted upon the principles contained in this Minute, and in the accompanying observations on the general reformation of the system of Equity as here administered.

The Office of Master could not be abolished, but its duties would be reduced in importance and difficulty. The Master would have leisure for other duties, and I think the best course to adopt would be to assign duties which would interfere as little as possible with his attendance on enquiries in his own Office. This Officer then would be Master, Accountant and Equity Registrar, executing also the duties now performed by the Sworn Clerk and Ecclesiastical and Admiralty Registrars, at a salary of 3,000 Company's Rupees per month, or thereabouts.

The Prothonotary to be also Clerk of the Papers, Clerk of the Crown, Sealer and Keeper of Records,... 2,000 per month.

Taxing Officer, Chief Clerk and Sole Officer of Insolvent Court, and to be also Attorney for Paupers, (this Office should be filled always by an Attorney) salary Company's Rupees .... 1,800 per month.

It is possible that some other union than that suggested here might be found more convenient. But I think that all the necessary duties of the Court on all its sides and of the Insolvent Court may be done by three principal Officers, but not by less. The minor Establishments of Clerks to the Judges, Interpreters, and Swearing Officers do not, I think, admit of reduction, except that I think the salaries of the Judges' Clerks might be reduced to 500 Company's Rupees per month on future vacancies.

The duties of an Official Administrator are arduous, and it is an Office of considerable pecuniary responsibility. Such an Officer should either be a Lawyer, or he should have ready access to professional advice; the Administration of one Estate, or of a few, may be conducted possibly without a resort to legal aid, but in a multitude of such Administrations

a multitude of difficult and embarrassing questions will arise. The charge of the Office is properly imposed on the Estate, and the extent of it must of course be measured by the difficulties and responsibilities of the Office. In many countries the State, by some Officer or Officers, administers the Estates of Intestates. If it be deemed preferable that the Official Administration of Assets, the Receivership and the Official Trusteeship should remain connected with the Court it would be necessary to have one more Officer than those named, but as his emoluments would be wholly derived from commissions the charge to the State would be the same as in the plan now proposed by me, but a reduction of commissions might take place to some extent. The result in round numbers of the reductions thus proposed would be about Sixty Thousand Company's Rupees per annum in salaries; and by a lower commission in the case of the Administration of Assets the emoluments of that Officer might be reduced probably to the extent of 20,000 Company's Rupees per annum, but the benefit of this reduction would accrue to the parties whose Estates are under the Official Administration.

The Judges Sir Edward Ryan, Sir John Peter Grant and Sir Benjamin Malkin fixed upon four Officers in their plan of the final arrangement of the principal Offices of the Court, as the smallest number consistently with the efficiency of the Court on its present system of Judicature. By disannexing the Official Administration, Trusteeship and Receivership from the Court, I think three principal Officers would suffice, but not fewer under any system, which I consider practicable. I have read Sir Erskine Perry's plan attentively, with a view to the rectification of my own views if erroneous. That plan proceeds upon the supposition, that the Judges at Bombay have not more than one-third of their time occupied. This may be the case at Bombay, but here it is not the case. At Calcutta, the Terms are four of 28 days each, the Sittings four of 14 days each at least, the Criminal Sessions out of Term are three of usually about ten days each; it frequently happens here that the Term business is not concluded within the Term, and that the Sittings are not sufficient for the dispatch of causes set down, in that case the Sittings are prolonged and arguments are taken out of Term, and it must be remembered that there are Sittings in Chambers out of Term throughout the year twice a week; in addition there is the work in Chambers in preparing judgments and considering questions that have occupied the attention of the Court in Term. I am as little favorable to a life of idleness any where as any one can be; the weak state of my health unfortunately sometimes disables me from attending to my business, but unless when attacked and disabled by illness, I give at present every portion of my time to the duties of my Office.

The Judges have frequently matters referred to them by the Government, who do them the honor to take their opinions on Legislative changes, and the Law Commissioners communicate with them on such questions. The Judges as in duty bound give their first attention to the business of the Court, and it too frequently happens that they are forced to delay answering the communications made to them in consequence of the pressure of business. Any plan that assumes that the Judges here have time to transact any portion of the duties performed by the Officers of the Court, except the Judicial duties of the Master which would not, when rightly managed and coming on in the course of the suit, take up much more of their time than is given to the suit at present would fail in its operation. It is always to be lamented when a Judge is forced to give his whole time to sitting in Court. It is his duty to render himself as well qualified for the discharge of his duties as his powers will permit; it is his duty to perfect himself in knowledge as far as he can. The eminent men who are appointed to fill the highest Judicial Offices at home, frequently regret their want of time to keep up their reading. How much more necessity is there here for some continuation of studies, when it is considered that the Judges here have to administer Ecclesiastical, Admiralty, Equity, and Common Law, and the Law of the Mahomedans and Hindoos, a more extensive range of jurisdiction, than falls to any one Court in England, except the Courts of Appellate Jurisdiction perhaps, and that they are not, and cannot be selected from the highest ranks in the profession. For my own part, I regret that I have not more time for reading; I am in the habit of reading all the Reports of all the Courts in England, but I am unable to keep pace with the publication of them. When the Judges of this Court were applied to, to take part in the decisions of the Small Cause Court, they readily consented and expressed no other fear than that they should not have time to dispatch that portion of the business, which it was desirable, that a professional man should dispatch. In the vacation, the time of one of the Judges, they thought might be constantly given, in Term and Sittings, they thought it would rarely be practicable, and this is still my settled opinion.

To work efficiently the plan suggested by Sir Erskine Perry, a Judge should be a man of the very highest powers and possess a very rare union of good qualities. This is essential, but even this would not ensure its success. It gives the Judge a degree of power which I think no Judge ought to possess: even the power of saying whether a suit shall be instituted in the first instance or not, since he is to say "whether any matter appears to be in dispute," and unless a Judge were of the highest order of merit the greatest errors would prevail in the Administration of Justice. The proposal that "in every case the Judge should decide on the principles

" of Law or Equity arising out of facts without reference to the form of " suit," however specious and captivating, would often be found to work great injustice. He must be quite certain that he has all the facts before him, otherwise he would administer Equity blindly and often erroneously; facts not before him would probably shew that his decision was partial and unjust. The party would come to meet one demand; and the decision would go against him because he had not prepared himself for a case not made known to him; but if to avoid these evils, the cause be adjourned for the purpose of trying in fact a new cause, little is gained perhaps nothing; and the natural consequence of the adoption of the principle recommended which has been often recommended and as often upon consideration rejected, would be uncertainty in the Law, and a multiplication of suits. Having practised at the Bar here, and having had a large share of Chamber practice, I know how often causes are kept out of Court by the opinions of Counsel, and it is often lost sight of in considering the advantage of an efficient Bar in the Administration of Justice that a great deal of litigation is checked by the opinions of Counsel which would otherwise flow in upon a Court. The consequence of mixing systems of Law and Equity, of allowing a suit to be decided on notions of natural Justice or Equity and not upon the adopted system of Municipal Law, of delegating large and discretionary powers to Judges, and of suffering a suit to be brought in one form and with one aspect and object, and a decree to pass in it upon some other state of facts, or on the same facts but to a different end, would be to introduce great uncertainty and to increase litigation, and it would be particularly objectionable in a place like Calcutta, a Commercial Commuity, with ramified interests closely connected with the maritime and commercial interests of England, and between which it has hitherto been the policy and object of the Government to keep to as close a similarity of Laws as the different state of circumstances admits of. The system proposed by Sir Erskine Perry would work a sudden and violent change. It does not admit of gradual introduction. Surely the preferable course, especially in a country like India, is to proceed by steps, retaining as far as it can be done established systems, purging them of their defects, and establishing on existing foundations a reasonable and cheap, and effective system which may be worked by men such as they are, and which does not depend for its successful working on the union of qualities and powers which are rarely found united.

Sir Erskine Perry proposes that in the first stage of a suit the party bringing it should appear before the Judge. This could not be done in a multitude of cases where the parties bringing the suit were not within the local jurisdiction of the Court, and in many where it could be done

it would be most inconvenient. If it should be said they may appear by Deputy, by Agent or Attorney, it should be remembered that the Agent or Attorney is often but imperfectly acquainted at the institution of the suit with the facts of it. He is often wholly unacquainted with the grounds of defence even in an after stage of the suit, and the principals some inadvertently and some by design conceal material facts from the knowledge of the Attorney or Agent. It may be requisite to file a plaint against a party at a time when it may be impossible to obtain a full knowledge of the case even of the plaintiff still less of that of the parties sued. To require the appearance therefore of the plaintiff or his Agent before the Judge at this early stage of the cause for the purpose of settling the suit would be in general ineffectual. If the appearance be merely to enable the Judge acting as Officer of the Court to act the part of professional adviser and to record the proceedings in a technical or legal form, for some such form there must be though of a simple character, it must be remembered that the Judge will then become mixed up with the party at an early stage of the suit; may mistake the statements of the party, or form an erroneous opinion of their legal bearing, he may content himself with such statement as the party gives, and take no steps to elicit a further statement, if he do more than this he must sift and put searching questions, and either excite the jealousy and dislike of the suitor in that early stage, or inspire an equally unfortunate feeling, the feeling that the Judge is his friend and has formed a favorable opinion of his case, and thus raise the suspicion and jealousy of the opponent. The case will either be prejudged in the mind of the Judge, or will be thought to be so. The system is to be applied not to simple demands of small amount; but to every case of complexity and difficulty which may be brought before a Court. What Judge can possibly be expected in such a case to form at once a tolerably correct judgment of the parties to be brought before the Court, and of the mode most favorable to the suitor in prosecuting his case; this is the business of the professional adviser and requires care and frequent conferences with the client, and is the subject of anxious consideration. Every failure will be imputed to the Judge, and every suitor who brings a demand and fails, will turn upon his Judge and say you misunderstood me, you did not frame my case as it should have been framed, my case was never properly brought before the Tribunal, and it ought to be heard anew. A timid Judge will yield to the demand; and if he have courage to refuse it, will be said he has denied justice to cover his own blunders.

Where an Officer is interposed between the Judge and the party, these mischiefs to a great degree are averted. There is no system so good

as that which enables a party who imagines he has a well founded claim to prefer it without the previous sanction of a Court, selecting his own professional adviser in whom he has confidence and to whom he may make disclosures he would be slow to make to an Officer of the Court or a Judge; which enables him to select an Advocate of integrity and skill; and no judgments are so likely to be correct as those which are formed upon reflection after the case has been fully argued.

In the Administration of Justice freedom from every restraint not imposed by the Law, is as necessary to the suitor and to his advisers, as to the Judge.

It is on this principle that privileges are allowed to the Advocate, which would otherwise be inadmissible.

It applies to the suitor not only in the choice of his advisers, but in the mode of prosecuting his suit.

Any interference of the Court in these matters would destroy all confidence in it.

If the power of assigning an Advocate to the party by the Judge not only without but against his request would create suspicion, what would be the effect of assigning his Attorney? of his becoming the Attorney himself? of his calling for disclosures that the suitor was unwilling to make, and rejecting those upon which he relied?

Could it have any other effect than to throw upon the Judge all the accumulated responsibilities of the professional character in all its grades, with all the invidiousness which is attached to each?

Ignorant parties in all countries, and in none more commonly than in this, are prone to attribute the failure of their suits to the treachery of their professional advisers.

Their Counsel is in the opposite interest. Their Attorney has received a bribe.

The complaints of the corruption and partiality of the Arbitrators, from their being brought into more immediate contact with the parties, though Judges of their own chosing, is proverbial.

Similar charges and suspicions would be heaped upon the Judge who would have nothing to oppose to them.

He would thus be deprived of all respect and authority beyond what the process of his Court could command.

Such a system could only be tolerated in an infant community, and not in one, like this, allied in all its interests with one in the highest state of civilization.

It is only by the conflict of independent views before an independent Tribunal that Truth or Justice can be elicited.

It is only by an intermediate agency between the Court and the suitor that these benefits can be secured, and this agency cannot be complete unless it combines the exertions of those most competent to the investigation of facts, and those best qualified to enforce their legal consequences.

This has been the system adopted in most civilized countries, and is the only one which has been devised by the ingenuity of men, by which, in spite of natural inequalities, the powerful and the weak, the intelligent and the ignorant, the bold and the timid, are enabled to meet on equal terms, on the arena of Justice.

That it is not equally successful in removing the inequalities of fortune, is an infirmity common to all human institutions, and no exemption from which can be presumed in favour of that which is opposed to it.

It is true, that every intermediate agency between the suitor and the Court is not only attended with expence, but with the introduction of a separate interest, not always in conformity with that of the suitor. But this is, to a certain extent, unavoidable, and is the necessary price by which alone any approach to freedom and equality can be secured to opposite litigants, and as such, wherever that object can be obtained, will be willingly paid. It does not appear that Sir Erskine Perry contemplates that the Judge should, in fact, become the sole professional adviser of the suitor, but it appears that Sir Henry Roper anticipates that such would be the result at Bombay of the adoption of Sir Erskine Perry's plan, in consequence of the effect which Sir Henry Roper supposes that it would have there on the interests of the Bar and Attorneys. In my opinion, the adoption of Sir Erskine Perry's plan would not produce that consequence at this Presidency. I will, however, consider the

probable working of the system under either supposition. I will take my examples from cases that have actually come before Courts for decision. I will first select the case of Few *vs.* Guppy, a case of no particular complexity. In that case, a vendor filed his Bill in the Court of Chancery in England for a specific performance, of a contract of sale of real Estate. The vendee had been let into possession, and being in partnership with others, they had dealt with the property in the affairs of their partnership in a manner which it was said was injurious to the Estate and permanently diminished its saleable value, this was relied on by the plaintiff not as the ground for compensation in case it should appear, that no Title to the premises could be made by the vendor, but as evidence of a waiver of good Title, and the acceptance of the Title such as it was. Now I will assume, that the plaintiff in such a case had no means of resort to professional aid, and that the Judge alone could furnish him with the aid necessary to the institution of his suit in its most advantageous form. The plaintiff would have but an imperfect notion of his rights, but would resort, in the first instance, to the Court. The Judge supposing him to be quick at ascertaining facts and able to evolve them from the confused statement which would probably be made to him, with his faculties alive to guess at facts either studiously concealed or omitted from inadvertence, and above all, having leisure to conduct this investigation, would at length become acquainted with all or the most material of the facts of the plaintiff's case. Upon that he would have to consider, first, whether a good Title had been waived, if not, whether a good Title could be made, a question often of very considerable difficulty; upon that he must either decide rapidly and perhaps erroneously, or he must take time to consider it, but decide it he must, in his own mind, in that early stage of the cause and *exparte* before the suit can be instituted. Let us suppose that he thinks a Title can be made and the suit proceeds on, that supposition being prepared under his directions in the proper form. At the hearing the defendant being like the plaintiff, *inops consilii* would not have the means of shewing that the Judge had mistaken the Law, that he had overlooked this authority, or misunderstood that, but still he might, if he were an intelligent person, bring certain facts to the Judge's knowledge or to his attention which had been either unknown or not sufficiently attended to before. The Judge whom we will suppose to be honest enough to correct his error which I believe to be no violent supposition, would dismiss the suit prepared under his own advice and in the mode in which he had prepared it. Would this be likely to inspire confidence in a Court or to give satisfaction to the public and the suitor? But suppose him to decide in favor of the plaintiff's claim, would not the defendant declare that his case was prejudged before it was heard; and that the plaintiff having

first gained the ear of the Judge, had irrecoverably biassed his mind against the defendant. Let us suppose on the other hand, that the Judge had thought that no case of Title could be made. Would the plaintiff be contented? He would himself be unable to bring the question properly before the Judge for want of legal knowledge; would he be confident of the infallibility of the Judge? He might have bought under legal advice whilst he had resort to it, that, as a good Title, which the Judge thought a bad one. Whatever his dissatisfaction he must acquiesce; there would be no appeal, and his suit would then be instituted as for a compensation, and in that suit other parties would have to be included, and its termination would be protracted by questions in which he would be unconcerned. But above all, it would not be the species of redress at which he aimed, and to which he thought himself entitled. In like manner as in the preceding instance new facts or new views of them might, even under this aspect of the suit, bar his recovery or limit it. The decision would be subject to the same reflections as in the preceding instance. Again, in such an aspect of the suit, not only would the plaintiff's claim for compensation have to be considered with the deductions, but the claims of the parties liable to the plaintiff, to be adjusted *inter se* with all the various questions arising out of partnership transactions, and to a certain extent, these must be determined on in an early stage of the suit. I will next consider the same case on the supposition, that the plaintiff had the means of access to professional aid in like manner as he has at present. His Attorney would collect the facts from him, would elicit those not originally communicated, and would then lay his case before Counsel, who would after looking into the authorities and anxiously considering the case on his own responsibility, advise a particular course of procedure. The resort would then be to the Judge. Now, in such a case, what would be his functions? Is he to be the mere scribe or entering Clerk to put in a legal form what the Counsel directs to be done? Is that likely to degrade the Judge or not? But the Barrister would insist on seeing that the suit was rightly instituted, and that his directions had been complied with, and his demand would be reasonable and just. The Judge then would be subordinate to the Barrister. But if the Judge is to exercise a judgment he must then examine into the case, and review the opinion of Counsel. Let us suppose that he differs from the Barrister. Does it follow that the Barrister is wrong? The putting on of Judicial robes works no miracle, if the man were ignorant, or but little learned, or rash and precipitate in judgment, though learned, or of an over-subtle and refining habit of thought, these defects would not be lessened by the mere assumption of the character of Judge. Many Barristers have justly a higher professional character than some Judges. The suitor would probably be told by his Attorney that his suit was

likely to be prejudiced by the fault of the Judge. He would withdraw his suit and he would practically be denied access to the Tribunal of Justice. But supposing the suit to proceed, though instituted, in a mode not approved of by the suitor and his professional advisers, if success attends it, the party who succeeds is not satisfied. It is not the remedy he sought, and to which he considers himself entitled. On the other hand, the unsuccessful party considers his case prejudged. But what if the defendant convinces the Judge that the plaintiff is not entitled to relief, or though entitled to some relief, is not entitled to the specific relief claimed? What then would be thought? in what a position would the Judge be placed who had insisted on the suit being framed upon his view, and had resisted the remonstrances of the suitor and his professional advisers. What benefit is there to counterbalauce all these serious evils? In the case now under consideration, the saving of a trifling part of the cost of a suit at the risk of increased litigation, and larger expence in its subsequent stages.

I will now select a case lately under the consideration of this Court. On a settlement upon a marriage treaty, the mother of the intended husband having a considerable real and personal Estate, conveys by one Deed to which the intended husband and wife are parties, the real Estate to Trustees in trust for herself until the marriage in fee; upon the marriage to herself for life, remainder to the husband for life, or until he should be adjudged Insolvent, and after the death of the husband or that adjudication, to the wife for life using words of Limitation of a singular and ambiguous character; with other limitations over. The personalty was conveyed by another Deed to the same Trustees upon nearly similar Trusts, but with a variation of language. Both these Deeds were very unskilfully framed, and the meaning of the limitations to the wife was by no means clear. The marriage took effect. The husband was adjudged Insolvent in the mother's life time. A divorce, a *Mensâ et thoro* took place between husband and wife. The mother died. She left property to her son who paid to the Assignee under his Insolvency the amount of all the debts, and claimed back the Estate which the Assignee had claimed. The wife insisted that the Estates were her's

under the shifting Clauses. Her claim was resisted by the husband. She filed her Bill. The questions that arose were, did the Settler mean an Insolvency after her own death, or an Insolvency at any time? What effect had the cesser of the Insolvency? Did the wife take any Estate in possession immediately on the cesser or was there a resulting use, and trust to the Settler, and if so, in whom was the present interest? If she took a present interest, was that subject to the *jus mariti*, and so the property of the Assignees? and if so, had she a claim for a settlement and to what amount? Now let us suppose the parties stript of professional aid. Let us suppose the woman to become acquainted with her rights, she would necessarily be ignorant of the extent and actual state of them. The Assignees and husband would scarcely be wiser. They all or some one or more of them resort to the Judge. In such a case how hazardous would be the position of the parties. A Judge unaided, would not probably on the mere view of the facts unless he were singularly gifted with knowledge, diligence and patient investigation, discover on the first resort the points on which the decision of the cause should turn. Is it too much to say that he might never discern them? It is the consequence of an argument at the Bar sometimes to direct the attention of the Court to points which may have escaped the attention even of Counsel. A case clear on the first view of it, and in which the difficulties are concealed from view would in such a tribunal as that which Sir Erskine Perry recommends, be almost invariably decided on first impressions. A Judge with no criticizing public, and few, save professional men, are competent criticks of the decisions of a Judge, would be in the greatest danger of falling into a careless and hasty decision of causes, and I should fear that few could be found whom it would be safe to entrust, especially in a country like India, under a system such as that which I am considering, with the discretionary and irresponsible powers with which it would entrust them.

PRESENT ESTABLISHMENT OF THE SUPREME COURT.

		Company's Rs.
Master, Accountant General and Examiner in Equity of the Supreme Court and Accountant General of the Insolvent Court per annum,	Mr. Grant,	48,000
Prothonotary, Clerk of the Papers, Clerk of the Crown and Sealer,	Mr. Holroyd,	36,000
Taxing Officer, Chief Clerk of the Insolvent Court and Record Keeper,	Mr. Ryan,	19,200
Sworn Clerk and Receiver,	Mr. O'Dowda,	27,600
Examiner in the Insolvent Court, Common Assignee and Commissioner for taking Affidavits in Jail,	Mr. O'Hanlon,	9,000
Attorney for Paupers,		4,800
Three Judges' Clerks at 700 Rs. each,		25,200
1st Interpreter Mr. Blaquiere,		9,800
2nd Interpreter Mr. Smith,		11,100
And 50 Rs. Monthly for Office Rent,		600
Interpreter of Foreign European Languages and Tipstaff,	Mr. Siret,	2,160
Cryer,	Mr. Hilder,	3,600
Allowance for Chopdars,		1,176
Two Interpreters to the Judges at 3,600 each,		7,200
Clerk to the Grand Jury,	Mr. R. Swinhoe,	800
Moulovee,		2,400
Pundits,		4,800
Moollahs,		528
Brahmins,		528
	Company's Rs.	2,14,492

OBSERVATIONS ON THE SYSTEM OF PROCEDURE IN THE SUPREME COURT OF JUDICATURE.

The expenses of a contested suit on the Plea side of the Supreme Court of Judicature at this Presidency, properly conducted without needless outlay and without errors in the progress of it, do not materially, if they at all exceed the average cost of the trial of a cause in the Superior Courts at Westminster even where the witnesses are all resident in the vicinity of those Courts. Occasionally the costs of a suit here will be found to be very high, but when that occurs it has been either owing to some blunder committed in the management of the cause in its early stages, or to the expence of executing process at a distance, or to the necessity of having commissions to examine witnesses, or to the expense of translations, or to the union of one or more of these causes of expense. These latter special causes of expense occur here to a greater extent and with more frequency than in England. Where they do not occur and there is no extravagance incurred (which when it occurs is commonly by the direction of the parties) either in retaining an unnecessary number of Counsel, or in having unnecessary conferences with them, or in paying them unnecessary heavy fees, the cost of a contested suit on the Plea side will, on an average be found, I believe, to be much about the same as that of an ordinary cause in the Superior Courts at Westminster. It occasionally happens, especially where Natives are parties and the amount in dispute is large, that there is extravagance in the conduct of the suit in the instances before enumerated at the suggestion of the parties, on whom of course this unnecessary outlay falls whatever be the result of the cause. The fees to Counsel and the expense of employing an Attorney, constitute the principal portion of the expense of a suit. I do not concur with Sir Erskine Perry in his objections to the system of special pleading. I do not think that that system is *peculiarly* appropriate to the mixed Tribunal of Judge and Jury, and I think that the substance of the system of special pleading is well calculated for a Court constituted like the Supreme Court of Judicature. It throws off the admitted facts, brings prominently forward the disputed facts, prevents any uncertainty in either side of the facts on which either side relies and tends to produce speediness and certainty of decision and cheapness of trial; it is very much the mode in which any sensible man in any domestic forum would apply himself to the settlement of any dispute referred to him by the litigants, and has its origin in simple times when a simple and natural mode of procedure was not unlikely to prevail. The technicalities are of after growth, and not many of them are necessary to be retained. The nicety of construction of the language of written pleadings is the cause of frequent embarrassment and expense,

and may be remedied; and it seems to be practicable to retain all the substantial part of the system of special pleading with all its acknowledged advantages, and at the same time to discard the material inconveniences to which it has become subject. The most obvious defect, the expense of litigation on points foreign to the merits of the case, has its origin frequently in the nicety, not to say subtlety, of the construction of language. Without meaning the slightest reflection on the Bar of this Presidency, to whose talents, learning and honorable conduct I am glad to bear an honest and a willing testimony, I must observe that less attention is paid here than in England to precision of statement in pleadings; from this cause occasionally arises expense to the suitor, and a special Demurrer is occasionally filed which has no tendency to advance the real interests of the client. The Court, however has, I hope, effectually remedied this evil by a late expression of its intention for the future with regard to the costs of special Demurrers of this character. The expenses of an Equity suit here as in England are very heavy, I know not that they are heavier here; but undoubtedly the expense is in many instances oppressive, they may be reduced in some degree, and I trust that we shall succeed in effecting soon some reduction of them; but it seems to me that the defect is mainly in the system, and that an Equity suit aims at too much, and that it is scarcely possible to reduce within moderate limits of expense or a moderate compass of time, the conduct and duration of a regular suit in Equity under the present system which suit aims at settling all the rights between all parties interested to any extent in the subject matter concerning which the present litigation arises. In a Court constituted like the Supreme Court where the same Judges preside on all the sides of the Court, much may be done in the simplification and improvement of a system of Equity which it has not hitherto been found practicable to effect in England. Here the same Judges who decide all questions of Common Law, are also the Judges in Equity, and there can exist no desire to retain jurisdiction on one side of the Court in preference to the other; whereas in England there is naturally a struggle for the retention of jurisdiction wherever it has once attached. It would be difficult to shew that any peculiar mode of procedure is essential to the decision of any questions that may arise under any of the various heads of jurisdiction possessed by the Supreme Court, and it would be obviously a great improvement to introduce in them a uniform mode of procedure which might easily be made to adapt itself to the particular system of Laws to which it was applied.

To illustrate this by an example. A man sues for a divorce from his wife on the ground of her adultery: and he sues the adulterer for

damages. As far as the proof of the adultery is concerned, the evidence will probably be the same, and is often supported by the very same witnesses. On the Plea side of the Court, the witnesses are produced, give their evidence *vivâ voce;* the Judges observe their manner, and are alive to any thing that may detract from the credit of their testimony. On the Ecclesiastical side before the very same Judges, the whole course is changed,—they do not see the witnesses; their evidence is pleaded; if objections are made, these objections are by Act in Court; and a less satisfactory and more expensive mode of procedure is substituted merely because the Court is sitting as a Court Christian, and not a Common Law Court. A suit for adultery no doubt is a suit of a wider range than one for satisfaction in damages against the adulterer, but it seems to me that one and the same suit seeking the double remedy a divorce against the wife, and damages against the adulterer, could in most instances be decided without inconvenience by a Court like the one under consideration. Let us select another instance,—a suit on the Admiralty side on a Maritime Contract, *exempli gratiâ* a suit for wages by mariners. The joinder of many plaintiffs having not technically a joint cause of action, but a common claim in respect of the same subject matter against the same party or parties, would be in my opinion an improvement in the system of Common Law: the remedies *in Rem*, as the detention of the ship, and its release on security, are easy of introduction into a suit at Law, why then should any difference exist between the trial of this claim and a claim for wages by an ordinary servant? These instances are merely specimens and are amongst the first that occur to me, and I use them merely as illustrations of my proposition, that a uniform course of procedure is perfectly consistent with the administration of different systems of Law. In considering the question of reform in the system of Equity it is requisite to bear in mind, that a considerable part of its jurisdiction arises from defects of the Common Law, as from imperfect powers in Courts of Law, or from narrow and technical rules of Law frequently working injustice, and as the jurisdiction has sprung up from defect in the Law, an amelioration of the Law supplies a remedy and justifies the extinction of the jurisdiction. In some few instances equitable remedies are engrafted by Statutes in the Common Law, in some few instances the Courts of Law have made the rigor of the system of Law bend to the system of equitable principles, and where this has been fully done the jurisdiction of Equity in such instances has rarely been resorted to subsequently. In some few instances powers once exercised by Courts of Law have gone out of use. In all cases which fall under any of these heads the remedy is plain, correct the Law; enlarge the powers of the Court, on its Plea or Law side; the jurisdiction of the Equity side becomes then unnecessary and may be abolished. For

example. A chose in action is not assignable at Law except in special cases: make it assignable and give the assignee his remedy at Law: The like observation applies to all possibilities and contingent interests; and sales of expectancies and reversions should be permitted without the interference of the Court of Equity save in cases of actual fraud. A Court of Equity on equitable grounds restrains the parties from proceeding to a trial, or from taking out execution, or stays waste to prevent irreparable damage, and so forth. In none of these instances is there really any necessity for a resort to the Court on its Equity side *in the nature of the thing*. That the Judges are not conversant with Equity cannot be predicated, for they are the Equity Judges on the Equity side of the Court. A Court of Law anciently restrained waste: and an account, now disused in Courts of Law, may be rendered as complete a remedy there as in Equity with proper machinery.

By an alteration effected on these principles the resort of suitors to the Equity side of the Court would become much less frequent than it is at present, but whatever scope is allowed to the operation of these principles a large portion of matters will still remain subject to equitable jurisdiction, and therefore it is necessary to consider how far the practice may be simplified so as to relieve it from its principal burthens.

The jurisdiction in Equity may be divided into—

1st. Purely Equitable.

2ndly. Concurrent.

3rdly. Legal but administered in Equity.

With respect to the first where the principles of Equity are ascertained and have in effect become a species of Law, there is no reason why they should be administered by a separate tribunal and why they should not be transferred to a Court of Law. Then the anomaly of the same rights being enforced by one tribunal and defeated by another would be got rid of, and Courts of Equity would be relieved from a variety of matters in which they in effect exercise a legal jurisdiction under another name.

2ndly. Where the jurisdiction is concurrent each would in some cases admit of improvement by a mutual transfer of their powers, so as to render each independent of the other. This has been done in a few instances, as for instance by enabling a Court of Law to issue commissions to examine witnesses and to entertain questions of interpleader; another mode in which it might be done, would be by enabling Courts of Equity to

try issues; and at Law to give a discovery by directing the examination of the parties. If however evidence were to be received *vivâ voce* in all cases on all sides of the Court, this larger improvement would render it unnecessary to introduce the partial amendment before referred to.

3dly. Where the jurisdiction is legal but administered in Equity, as is the case with Account, Administration of Assets, &c., it is of little consequence whether it be retained or not, as the machinery must be retained whatever be its denomination—this however might admit of some simplification. To pursue the above subjects more in detail under different heads of jurisdiction in Equity.

ACCIDENT AND MISTAKE.

Relief on these grounds might be given at Law, as for instance an action on a lost Bill of Exchange giving Indemnity. This principle has been applied by admitting an action on a lost Bond or Deed with an excuse for *Profert*. The relief against forfeitures and penalties might also be extended as in the case of arrears of rent.

Mistakes in instruments might be corrected at Law as in Equity.

SPECIFIC PERFORMANCE.

This might to a considerable extent be effected at Law. The principle is applied when a verdict for damages is given reducible upon performance.

There seems to be no objection upon principle to the prosecution of an action at Law upon an agreement for the purchase of real Estate claiming in the alternative a performance of the agreement or damages, and to a conditional assessment of damages with an option in the plaintiff to claim the specific performance. If a question arise as to Title it seems to me that the Court should itself determine the question of Title without any reference to the Master unless the investigation were one of a protracted character. The examination of parties at Law would be the substitute for a discovery in aid of a suit at Law, where a ground was laid for a discovery on summary application to the Law Court.

TRUSTS

Should remain subject to the jurisdiction in Equity. A summary process would in most instances suffice whether the object were simply an account or the construction of an instrument.

DOWER AND PARTITION.

The jurisdiction in Equity being grounded on imperfection of powers in Courts of Law there seems to be no ground for its retention. If retained however the process should be summary as it is in partition in the Supreme Court by one of its rules.

ACCOUNT.

Unless the question involved the execution of a Trust, there is no reason why resort should be had to Equity, the machinery on any side of the Court being capable of application on all its sides.

INFANTS AND LUNATICS.

The jurisdiction should be summary, and in the latter case without the expense of a Commission, and the Court itself summoning before it all necessary witnesses.

SUMMARY JURISDICTION.

The institution of a regular suit is the great expense in Equity as in the Ecclesiastical Courts. I think that a summary procedure might in most cases be instituted as it has in some instances in the Ecclesiastical and Admiralty Courts. It is already exercised in Bankruptcy without inconvenience—it is given by several Statutes as in the case of Infant Trustees. By substituting summary proceeding for full proceeding and a regular suit; by the substitution of *vivâ voce* evidence for written testimony, by rendering a Cross Bill unnecessary by the examination of parties now resorted to in some instances after decree, by adopting with extensions the practice lately introduced at Law of calling for admissions, and by other modes of simplification, the burthensome character of a suit in Equity might be destroyed, and the resort to that branch of jurisdiction when necessary would not be impeded if not prevented altogether by a dread of the expence and protracted litigation to which an Equity suit now gives rise. I will conclude these observations by observing that for a considerable part, and I doubt not the most valuable part of those relating to Equity, I am indebted to Sir Henry Seton, between whose views as to the reform of the system of Equity and my own I am glad to observe no material difference.

LAWRENCE PEEL.

February 13, 1844.

G. H. Huttmann, Bengal Military Orphan Press.

FROM THE INDIAN LAW COMMISSIONERS,

TO THE HONORABLE THE PRESIDENT OF THE
COUNCIL OF INDIA IN COUNCIL.

Dated 15th February, 1844.

HON'BLE SIR,

We have now the honor to report upon Judicature in the Presidency Towns, confining ourselves for the present to the Civil branch of the subject.

We believe that in no other country are the Judicatures of the Capital so completely isolated from those of the Provinces as in the three Presidencies of British India.

In the way of Appellate Judicature, or of general superintendence, the Supreme Courts have scarcely any connection with the Courts of the Mofussil. And in the exercise of their original jurisdiction those Courts and the Courts of Requests have been appointed to administer Law in the Presidencies with as little reference to the improvement of Indian Jurisprudence and Indian Judicature in general as if the Presidency Towns had to this day been Factories in which the Imperial Court of Delhi permitted our Sovereign to administer justice to her own European Subjects.

We have already announced in our Report upon the *Lex loci* of British India our recommendation for the establishment at each Presidency Town of a College of Justice or High Court of Appeal, consisting of the Judges of the Supreme Court and those of the Sudder Dewanny Adawlut. This High Court will exercise Appellate jurisdiction and have general superintendence over all the Judicatories of the Provinces, and preserve regularity and uniformity of procedure amongst them.

But we would have the Mofussil Courts taught not only by precept but by example.

We consider the reform of the Presidency Courts of the greatest importance not only for the purpose of ensuring the best administration of justice in those Towns, but for the still higher purpose of making them fit models for the imitation of all the other Courts of the Country.

In two respects the Courts now existing in the Presidencies are very unfit models.

First, in respect that Small Causes are adjudicated by a different Court and according to a different procedure from all other Causes.

In some particulars the Small Causes enjoy great advantages over the others; in some these others enjoy great advantages over the Small Causes.

At present there is no way in which a suitor in the Presidency Towns (Bombay is a partial exception) can have the benefit of cheap and rational procedure (particularly in the *vivâ voce* examination of his adversary) without foregoing the benefit of that legal learning which secures the correct application of the substantive rules of Law and Equity. Nor is there any way in which a suitor can get the benefit of that legal learning, except by sacrificing the advantages of cheap and rational procedure.

Yet there is in reality nothing incompatible in these two sorts of advantages, though perhaps they have never yet been united in practice. To unite them is one of the main objects of our present scheme, and we shall begin our Report by explaining in what way such suits as usually fall within the jurisdiction of Courts of Requests, will be dealt with under the system of Courts proposed by us.

The second respect in which the Courts existing in the Presidencies, are very unfit models is that the Rules of Law which are called Law, and the Rules of Law which are called Equity, are administered by two different jurisdictions.

In the result we contemplate the administration of all the substantive Law of the country, put into the form of Codes, by one system of Courts.

But it seems clear to us that the Rules of Law which are called Law, and the Rules of Law which are called Equity, should in their present condition be administered by one system of Courts in the Presidencies as they already are in the Mofussil. On account, however, of the magnitude of this experiment, and on account of the high authorities which may be vouched against it, we propose to proceed by steps.

We propose only to give to our new Court power to administer complete justice, that is to administer Equity as well as Law, in all suits within its jurisdiction; and we propose that its jurisdiction shall be concurrent with, not exclusive of, *the jurisdiction of the Supreme Court in actions at Law*, leaving to the Supreme Court alone for the present, all the rest of its Equitable jurisdiction.

We ourselves feel perfectly confident of the success of our experiment, but confidence of the success of such an experiment cannot be attained without long and careful reflection; the public therefore cannot be expected fully to share it.

But proceeding as we propose by steps, all that can be imagined to be put to hazard by failure, is of trifling value compared with the benefits to be attained by success.

For suppose that, as we expect and intend, the suitors at Law should be drawn away from the Supreme Court by the greater cheapness and simplicity of the new procedure, and the faculty of examining the adversary; and suppose further that contrary to our expectations, the new Judicature, Original and Appellate, should not appear to those who may watch its operation with a view to the interests of justice, to be a powerful instrument for the discovery of truth and for the correct application of the Rules of Substantive Law, then the whole of that large portion of Equity which is not consequent upon a suit at Law, would remain untouched, and if ever reformed at all, would be reformed in some other way. The whole machinery would be left standing, and the portion of Equity and of Law drawn away by our new Court, would revert to its original condition.

On the other hand if the experiment should, as we venture to foretell, be completely successful, the Government could then proceed with the greatest confidence to provide that the new Court should entertain all suits in Equity, whether based upon previous proceedings at Law or not.

In like manner and for the same reason, (viz. the doubt which may be felt by the reflecting portion of the public as to the success of our experiment), we do not recommend the abolition of the Common Law jurisdiction of the Supreme Court. We believe that such a measure might be unpopular, and we think that our object may be attained in a gentler way, and without shocking any prejudices, by allowing the two

systems to subsist together. We do not even intend to protect the jurisdiction of the new Court by enacting that no one who sues at Law in the Supreme Court shall recover costs.

If this plan is adopted there will be two roads open at once by which the suitors of the Presidencies may obtain the great benefit of having the profound learning of the Judges of the Supreme Court applied to their affairs.*

To disentangle transactions which the ignorance, negligence, and fraud of mankind have complicated, and to refer each essential part of the transaction to the principles of Law or Jurisprudence which ought to govern it, must always be the subject matter of a science and an art. It is vain to expect that this science and this art can be fully mastered without long and arduous discipline. That discipline the Judges of the Supreme Court have gone through, and it is because of the high value we set upon their science and art, that we are so anxious effectually to open the advantages of them to the public.

When these two roads are open at the same time it will be very instructive to observe what sort of causes are carried by the new road and what sort by the old. Our own belief is that in no long time it will become disreputable to sue at Law in the Supreme Court. It will soon be understood that a plaintiff who prefers bringing his action there, is a man who is afraid of being personally examined as to the truth of his case, a man who shuns equity and good conscience, a man who wishes to entangle his adversary in the meshes of written special pleadings and to have his cause decided upon some point foreign to the merits of it.

In this state of things we of course expect that the Common Law jurisdiction of the Supreme Court will wither away in the presence of its rival, and that the Legislature will shortly be able to abolish it without exciting alarm or regret.

There are two other respects in which the Tribunals of the Presidencies are, in our opinion, unfit models.

* The only qualification we have introduced into the Act for the professional Commissioners, is, that they shall be Barristers of five years standing—under this provision the Judges of the Supreme Court might of course be employed in administering justice in the new Court. But if they should not be so employed, the suitors will have ready means of obtaining the benefit of their learning under the scheme which we are recommending, by appeal to the College of Justice.

First, in respect to their method of pleading.

Secondly, in respect that the public is not associated with them in the business of Judicature.

In the Supreme Court there are the elaborate rules of English pleading calculated for the most part, as we believe, to produce the best results when they are observed ; but as the pleading is not oral, the mode in which the neglect of them is visited upon the suitors produces great mischief, and the consequence of this mischief has been a very strong prejudice against special pleading.

To such an extent has this prejudice run that every unfair attempt to put aside in an argument the real merits of the case, is in popular language called special pleading. It must be confessed however that the confusion of thought which is implied in such an application of the term " special pleading" is owing quite as much (if not more) to the indiscriminate defence of the English system, as to the indiscriminate attack upon it.

The truth is that special pleading, that is to say the logical rules which constitute the essence of it, and which are of universal application, is not only, what Mr. Serjeant Stephen calls it in his admirable treatise on the subject, " a fine Juridical invention," but is the method which ought to be followed in all disputes whether forensic or not, by parties desirous in good faith of terminating their disputes.

In the Court of Requests the pleading is oral, but is subjected to no rules.

In neither Tribunal is there any Jury, or any portion of the public appointed to perform such functions of a Jury as are really useful.

The Draft Act for establishing our new Court embodies our project for reform in both these particulars; but we beg to reserve the full discussion of them for a future Report. We are aware that with respect to them differences of opinion exist, while with respect to the subjects of our present Report we have sanguine hopes of unanimity.

Before entering upon the subject matter of our Report we have to make one more prefatory statement.

We have considered anxiously whether it would be better to treat the two topics, viz. the incorporation of Small-Cause jurisdiction with general jurisdiction, and the incorporation of Equity jurisdiction with Common Law jurisdiction, abstractedly, or by a critical examination of the principal English cases which bear upon the subject.

We have decided upon the latter course. We are sensible, however, that it has some serious disadvantages. Such an examination must of necessity be incumbered with difficult and repulsive technicalities. And as the cases are not imaginary ones, devised by human ingenuity for the illustration of the subjects, they unavoidably contain much matter which is not so illustrative; which matter must nevertheless be examined for the full understanding of that which is so illustrative. These cases do not resemble the experiments which the Chemist invents in order to test his doctrines, and from which he studiously excludes every thing that is foreign to his purpose. But they resemble the chemical processes of nature which the Chemist observes, and in observing which he is forced to pay attention to many things which are beside his immediate purpose, in order that he may be sure he understands what is within that purpose.

On the other hand these cases possess the great advantage of reality. They are part of history. They exhibit the actual sufferings of human beings under the rules of English procedure, and shew how those sufferings might have been prevented: or they shew how impending sufferings actually were prevented by the benevolent yet questionable interference of the Judges in relaxing those rules. These cases contain also (and this consideration alone would have determined our course) nearly all the arguments by which the system we are endeavoring to reform, has been defended.

A refutation of these formidable arguments, formidable, as we believe, principally from the high station and still higher abilities of those from whom they have proceeded, seems absolutely essential to our purpose, and is in truth all that is essential to it.

We trust, therefore, that we shall be excused for the dryness, perplexity, and technicality of the details into which the course we have adopted, will inevitably lead us.

We now proceed to explain in what way such suits as usually fall within the jurisdiction of Courts of Requests will be dealt with under the system of Courts proposed by us.

It is not to be questioned that there are a great many suits which so far as regards original jurisdiction, any sensible man of business is competent to decide without the aid of technical knowledge, and the appointment of unprofessional Judges for the decision of such suits is a measure suggested by a due regard to economy. But it does not appear to us that this object is accomplished in a convenient manner by two wholly independent sets of Courts separated by an arbitrary pecuniary limit, and administering justice under rival systems of procedure, especially when the inferior set decides causes without any more regular and constant supervision, than can be exercised through Writs of *Certiorari* and Actions of trespass against the Judge. The consequence of this arrangement is that practically the inferior Court decides without any control. All its decisions are acquiesced in, though it cannot be supposed that they are all right; or that they are as nearly all right as they would be under the check and stimulus of appellate jurisdiction. We believe there has been no instance of a *Certiorari* to the Calcutta Court of Requests. As far as we know, its proceedings have never till lately been called in question. In a late case a defendant irritated by a decision against him in a suit which (though the Commissioners had been in the habit of deciding cases of the sort) was beyond their jurisdiction, used, as is alleged, intemperate language to the Court, said that the proceedings and decree against him were all illegal, and brought his action against the Commissioner in the Supreme Court, where he recovered judgment upon demurrer.

We think this an invidious way of keeping the inferior Court within the limits which are intended to circumscribe its proceedings; and accordingly, in our own system, this is done without any harsh pressure from above by a smoothly working internal organization of the whole system of Courts. If such a case as that to which we allude, which was an action against an Executor, were to come before the Subordinate Civil Court which we are proposing, the Chief Commissioner (who must be a Barrister of five years standing,) would reserve it for himself, or some other professional Commissioner. If by mistake he should assign it to an unprofessional Commissioner, that Commissioner would send it back to him. If by a second mistake the unprofessional Commissioner should not send it back, but proceed to hear and to decide, he would indeed exceed the limits intended in point of convenience to circumscribe his proceedings; but he would

not in point of law exceed his jurisdiction; for that has no other limit than the jurisdiction of the Subordinate Civil Court, of which he is a Member. Any error he might have fallen into would be set right upon appeal to the Chief Commissioner, but the decision of the unprofessional Commissioner would be supported if it should turn out to be right, although according to the policy of the law, the suit is not one which ought to have been brought before him.

The mode of proceeding by Action of trespass against the Judge is applicable only to a case in which the Court has exceeded its jurisdiction. So long as the Court keeps within the limits assigned it by law, the only mode in which it can be interfered with is the Writ of *Certiorari*. This Writ may be obtained from the Supreme Court, by any party to a suit in the Court of Requests, not only upon the ground of excess of jurisdiction, but, it seems, upon any ground from which it can be inferred, that complete justice will not be done by that Court. Applied by an English Court of Law to a Court of Requests, it is a remedy of an extraordinary and rather violent nature, by which the cause is, as it were, snatched away by a Superior indeed, but not Superordinate tribunal, to be dealt with according to a different procedure, and upon different principles.

The modes by which in English procedure a Superordinate Court sets right the mistakes of its subordinates, are Writ of Error and Writ of False Judgment.

The *Certiorari* is the mode in which a Superior, but not Superordinate Court controuls the proceedings of those which are inferior, but not subordinate to it. The nature of this Writ is well explained as far as regards our purpose by the case of Groenwelt v. Burwell.

" The Censors of the College of Physicians have power by their " Charter confirmed by Act of Parliament to fine and imprison for mal- " practice in Physick; and accordingly they condemned Dr. Groenwelt for " administering *insalubres pillulas et noxia medicamenta*, and fined and " imprisoned him: and the question being, whether Error or *Certiorari* " lay, &c. It was held per Holt Chief Justice, 1st. That Error would not " lie upon the Judgment, because their proceeding is not according to the " course of the Common Law, but without Indictment or formal Judgment: " yet 2nd. That a *Certiorari* lies; for no Court can be intended exempt " from the superintendency of the King in his Court of B. R." I. Salk. 144.

Now it is quite reasonable, that in superintending such a Collegiate and professional Judicature as this, the Court of King's Bench should be satisfied with keeping the inferior tribunal within its jurisdiction, and with seeing that there is no manifest partiality in the proceedings; and should

not undertake to decide whether what this learned body had pronounced to be "*insalubres pillulæ et noxia medicamenta*," were really so or not. But it seems to us quite extravagant to say (as is in effect said by using the *Certiorari* as the sole instrument for controlling a Court of Requests) that a small debt differs from any other debt in the same way as the *mala praxis* of a Physician differs from an ordinary offence.

According to the spirit of our plan, cases which involve questions of law of any difficulty ought to be decided originally by the professional Members of the Court, but some questions of law must inevitably arise in the suits which will be assigned to the unprofessional Members, and we have therefore provided, that their decrees, as well as those of their colleagues, shall be consistent with equity and good conscience *following such law as would be administered to the parties by the Supreme Court.*

The direction and limitation thus expressly given to equity and good conscience, and which are perhaps tacitly implied in the terms themselves, appear to us of very great importance; and we do not see how we can ensure that this direction and limitation of the equity and good conscience of unprofessional Judges shall be constantly observed, otherwise than by giving an appeal from them to Judges who have received a legal education.

A Court which should proceed according to any supposed equity and good conscience without reference to law, would be an institution of very questionable utility, or rather such a course of procedure would be impracticable. For it is in truth impossible to say what equity and good conscience require, in a country where there is any law, without considering what were the lawful and conscientious expectations, in respect of the subject matter, of the parties concerned; and it is impossible to know what these expectations were without knowing the law which the parties had in their contemplation.

Even in cases of contract which are emphatically the province of equity and good conscience, it is impossible to proceed without advertence to the existing law. In many contracts much is implied by law beyond what is expressed. A bill of exchange, one of the most common contracts, does not express any of the rights and obligations which are created by the act of drawing it. They are all implied by law. How then is it possible to adjudicate according to equity and good conscience between the parties to a bill of exchange, without adverting to the law

out of which their expectations arise ? To put a particular case, let us suppose an action brought against the drawer, and that the defence is that no notice of the dishonor of the bill was given him. Unless the Judge knows, first, that the law imposes upon the drawer an obligation to pay the bill if the acceptor does not, and secondly, that the holder of the bill cannot enforce the obligation if he has omitted to give notice of dishonor to the drawer; unless, we say, the Judge knows these things, he may as reasonably expect to find the equity and good conscience of the claim or of the defence, by making the parties draw lots, as by searching for it in his own breast and in the bit of paper before him.

Perhaps, however, it may be asked if every thing is to be decided according to law, in what sense is this Court, a Court of Equity and Good Conscience?

The answer to this question so far as regards the cases intended to come before the unprofessional Commissioners, is, we apprehend, that English Courts of Law have rules of procedure (pleading, evidence and practice) which frequently, though accidentally, shut out the Equity and Good Conscience of the case. The lawful and conscientious expectations of the parties do not depend upon these rules as they do upon the rules of substantive law. Two men who are conscientious, and who believe each other to be so, do not, when they enter into a contract with each other, expect to have any thing to do with the rules of procedure, and make their contract without any reference to such rules. A Court of Equity and Good Conscience deciding such cases, as we intend to come before the unprofessional Commissioners, is then simply a Court which is not precluded by its rules of procedure from fulfilling the lawful and conscientious expectations of the parties.

It would be difficult to assign any other than technical reasons why such Courts should be considered as outcast from the general administration of justice in the country.

Whitelocke in treating of the Court of Chancery, quotes a gloss on the Grand Coustumier of Normandy, fit to be adverted to upon an occasion of this kind.

" *In Magistratibus imperium communicatum non est liberum,* " *sed regulis juris subjectum; etiamsi causa ei esset commissa in con-* " *scientiâ quia tunc intelligetur de conscientiâ legibus munitâ. f.* 4. " 6. gloss."

This gloss Whitelocke thus translates and expands—

"In Magistrates the Government (power?) communicated is not "free, but subject to the rules of law; though the cause be committed "to him in conscience, because that is to be understood a conscience "armed with law; not that which one builds to himself. But he must "follow the conscience of the public laws; not his peculiar conscience." Whitelocke's Notes upon the King's Writ, &c., Vol. II. p. 393-4.

This doctrine appears to us to be of universal application. We would commit no causes to the conscience which a Judge builds to himself. We hold that a Court for the Recovery of Small Debts ought to follow the conscience of the public laws; not the peculiar conscience of the Judge who happens to be presiding in it, and, as a consequence, we hold that such a Court should be incorporated with the general judicial system, and subject like all other Courts of original jurisdiction, to have its errors set right by appeal.

It is however true that those Courts of Conscience of which the sole or the principal object is the recovery of small debts, have never been admitted within the pale, so to speak, of English Judicature.

We shall notice in another place a project which Lord Mansfield seems to have entertained, of dealing with their proceedings by means of an Action for money had and received (which he was fond of calling a Bill in Equity) as the Courts of Chancery and Exchequer deal with the proceedings of Courts of Law by Bill in Equity properly so called. This project was never followed up, and if it had been, its remedial operation must needs have been very small. But in a late case (Scott *vs.* Bye, 2 Bing. 344.) an attempt was made to bring the proceedings of the Southwark Court of Requests under the supervision of the Court of Common Pleas by means of a Writ of false judgment, which is the regular mode of correcting the errors of an inferior Court not of record. The Common Pleas held that they had no jurisdiction.

Some of the observations made in the judgment delivered will help greatly to illustrate our own views of the subject.

Chief Justice Best said—

"In the Court of Requests, pleadings in writing are not required "and would be highly inconvenient. A party may be examined as a "witness and the judgment is to be according to *Equity* and *Good Con-*

" *science*, that is, such as a plain man ignorant of the rules of law, which " the Judges of that Court must be, shall think just. If the expence " and delay that must be occasioned by an appeal to the Common Pleas, " did not entirely defeat the object of the Legislature in creating Courts of " Requests, can a Court, the decisions of which are wisely subject to fixed " rules, be a proper tribunal to correct the proceedings of Courts where the " Judges are left to the guidance of their own arbitrary discretion ?"

All the other Judges took the same view, and Mr. Justice Burrough putting the principal objection still more pointedly than the Chief Justice, observed, " the words ' Equity and Good Conscience' imply a course of " proceeding different from that of the common law, and one of which " we are not competent to form a judgment."

According to our conception the true theory of Courts of Requests is not that the questions which come before them should be decided by plain men ignorant of the rules of law applicable to those questions ; but that the questions should be of so simple a nature that the law applicable to them may be presumed to be within the reach of any plain man of ordinary education.

We readily admit that the expence and delay of an appeal in the form of a Writ of false judgment, would defeat the object in view, but the appeal which is intended to be given in our system will be as cheap, simple and rapid as it is possible to make it. Indeed one of the great objects we most constantly keep in view in our recommendations regarding procedure, is to bring the learning of highly educated Judges to bear in the speediest and least expensive manner, upon the disputed rights of all classes of the community.

We have already said that it does not enter into our contemplation to give " *arbitrary discretion*" to any class of judicial functionaries, and as to the incompetence of English Judges to form a judgment of a course of proceeding such as is implied by the words "*Equity and Good Conscience*," we remark that the proposition affirming such incompetence, must be understood with special reference to the occasion. Upon a Writ of error or a Writ of false judgment they are incompetent, and if the Legislature were to insist upon bringing the proceedings of Courts of Conscience for revision before them by either of these Writs, or by any proceeding in the nature of these Writs, the consequence might be that notwithstanding the simple and rational nature of the procedure below, the lawful and conscientious expectations of the parties might sometimes be disappointed by the reversal of decrees, which, though arrived at in an

irregular manner, might very well stand according to Equity and Good Conscience.

But without going out of the circle of English practice, a mode of proceeding in the nature of an appeal from unprofessional to professional Judges, may be found, which, as far as regards the due subordination of form to substance, is every thing that can be desired. We mean the mode of proceeding by motion for a new trial, and it is accordingly from this that we propose to borrow the principle of our appeal.

If Mr. Justice Burrough had been hearing a motion for a new trial to set right a mistake committed by the jury in trying a cause, he would have expressed himself very differently respecting Equity and Good Conscience from what he did in the above cited case of Scott *vs.* Bye. He would have declared that he understood perfectly well what was meant by those words, and that he was bound to decide in accordance with their meaning.

We propose to examine with some attention the leading English cases upon motions for new trials. This examination will shew that the principle of confirming upon appeal what has been done irregularly by unprofessional Judges (for such juries are when their verdict involves matter of law) provided the justice of the case has been attained, is known and practiced in English procedure; and also what a beneficent effect the principle has already produced in the English system by preventing the disappointment of lawful and conscientious expectations.

Lord Mansfield inquiring into the whole doctrine of new trials, says—"The rule laid down by Lord Parker seems to be the best general rule "that can be laid down upon this subject, viz. doing justice to the party, "or in other words attaining the justice of the case." 1 Burr. 395. In another case he says—"Though the ground of the verdict should be "wrong, yet if it clearly appeared to us now that upon the whole no "injustice had been done to the defendant, or if it clearly appeared to us "now that the plaintiffs by another form of action could recover all they "have got by this verdict we think the Court ought not to grant a new "trial." 2 Burr. 936.

Upon the same subject Lord Camden says—"We are forced to say "the verdict is according to the justice of the case, and on a motion for "a new trial we are desired to grant it for a fault in the declaration "against the justice of the case. But if I had only the case of Dearly "*vs.* the Duchess of Mazarine, 2 Salk. 646, to warrant me (though the

" jury were liable to an attaint in that case) I would not grant a new " trial in the present case."

In the same case Mr. Justice Bathurst says—" But the Court can " see in this case that justice and equity are with the plaintiff, and they " never will grant new trials when the verdict is on the honest side of " the cause. The case of Smith *vs.* Page, 2 Salk. 644, is a very strong " case to this purpose. In Ejectment the plaintiff was a mortgagee and " claimed by surrender whereas the land was not copyhold and the defen- " dant claimed only by a voluntary conveyance, the verdict was for plain- " tiff and the Court of B. R. would not set it aside and grant a new " trial against the honesty of the cause." 2 Wils. 302.

The case of Edmondson *vs.* Machall, was an action of trespass for assaulting and beating the plaintiff's niece *per quod servitium amisit.*

The case proved on the part of the plaintiff was aggravated by many circumstances of ill treatment. Another cause stood next in the paper for trial which was brought by the niece against the same defendant for the same assault. The Counsel for the plaintiff declared their intention of not trying that cause and withdrew that record. The Jury found a verdict for the plaintiff, damages £300, which it was admitted were not excessive if the Jury were not confined to the consideration of the mere loss of service to the plaintiff.

Mr. Justice Ashurst said—" that the Judges of this Court had " consulted with the rest of the Judges on this case and the result of " their opinion was, without giving any positive opinion upon the " question of law, that this rule (a rule for a new trial) ought to be " discharged. An application for a new trial is an application to the " discretion of the Court who ought to exercise that discretion in such " a manner as will best answer the ends of justice. It does not require " much penetration to see what are the ends of justice in the present " case. It is certain that the girl herself ought to have some satisfac- " tion for the injury she received, and that she consents not to try her " action: the question is, whether justice has not already been done, " for it was admitted at the bar that if the injury she sustained could " be taken into consideration in this action brought by the aunt, the " damages which the Jury have given, are by no means excessive. Then " there does not appear to be any ground for the defendant to call on the " discretion of the Court to send this cause down to be retried on a " technical objection in point of law; and all the Judges are unanimous-

" ly of opinion, that, as complete and substantial justice has been done, " there is no reason to grant a new trial.

" On the plaintiff's undertaking to pay over to the niece the damages " after deducting the costs of this action, and on the niece's undertaking " not to proceed in the action in which she herself was plaintiff. Rule " discharged without costs." 2 T. R. 4.

In the case of Wilkinson *vs.* Payne, Lord Kenyon says—" In the case " of new trials it is a general rule that in a hard action where there is " something on which the Jury have raised a presumption agreeably to " the justice of the case, the Court will not interfere by granting a new " trial when the objection does not lie in point of law. This rule is " carried so far that I remember an instance of it bordering on the " ridiculous, when in an action on the Game Laws, it was suggested that " the gun with which the defendant fired was not charged with shot, but " that the bird might have died in consequence of the fright; and the Jury " having given a verdict for the defendant, the Court refused to grant a " new trial. In this case though the first marriage was defective, a " subsequent one might have taken place : the parties cohabited together " for a length of time and were treated by the defendant himself as man " and wife—these circumstances, therefore, afforded a ground on which " the Jury presumed a subsequent marriage. And if there were any " ground of presumption, it is sufficient in a case like this. In this case " the parties did not intend to elude the marriage act, but all their friends " were fully informed of and concurred in the former marriage, and I think " we should ill exercise the discretion vested in the Court if after the Jury " had presumed a subsequent legal marriage under all the circumstances of " the case we were to set aside their verdict. In a late case of Standen *vs.* " Standen, the Jury presumed a legal marriage though there was strong " evidence to induce a suspicion that there had not been time enough for " the banns to have been published three times." 4 T. R. 469.

In the same case Mr. Justice Buller says—" If the verdict be " consistent with the Justice, Conscience and Equity of the case, we " ought not to grant a new trial. This is not so strong a case as Dearly " *vs.* the Duchess of Mazarine, where the Court refused to grant a new " trial though the verdict was against law."

In the case of Cox *vs.* Kitchin, the same celebrated Judge again lays down the same doctrine. The Judge who tried the cause had directed the Jury in case they should be of opinion that the defendant was living in a state of open adultery at the time of the contract made,

to find a verdict for the plaintiff, for, as the husband under those circumstances would not then be liable, he thought the wife must be liable herself.

" This case comes before the Court under very different circumstances " from those of the case cited (a case had been cited to shew that the " law was against the plaintiff). The question there arose on demurrer, " whereas this is a motion to set aside a verdict. Motions for new trials " are governed by the discretion of the Court. When the Judge at *Nisi* " *Prius* has thought fit to save a point the Court has been in the habit of " considering itself in the situation of a Judge at the time of the objection " raised. But this case comes before us without any point saved, and " therefore, we must look to the general justice of the case before we " interpose by granting a new trial ; nor is it necessary we should nicely " examine whether the defendant be strictly liable in point of law. The " leading reported decision on the subject of granting new trials is that " of the Duchess of Mazarine. There can be no doubt but that was the " case of a verdict against law, yet the Court said that as the justice and " conscience of the case were clearly with the verdict they would not " interpose."

He then discusses the law of the case and concludes—" but whether " she be strictly liable or not, it appears, that she has lived as a *feme sole*, " that she has represented herself as such, and has obtained credit under " that character. The defence, therefore, is dishonest and unconscientious, " and on that ground I think that the Court ought not to interpose." The rest of the Court concurred on this last point, and the new trial was refused. 1 Bos. and Pull. 339.

The case of Smith *vs.* Page, 2 Salk. 644, was an action of Ejectment. The plaintiff was a mortgagee and claimed by surrender (a mode of conveying applicable only to copyhold land), whereas the land was not copyhold. The defendant claimed only by a voluntary conveyance. The verdict was for the plaintiff, and the Court would not set it aside and grant a new trial against the honesty of the cause.

The case of Dearly *vs.* The Duchess of Mazarine, was an action for wages brought against that celebrated Duchess; and the Jury found for the plaintiff though she gave good evidence of her coverture. The Court would not grant a new trial, because, says the Report, there was no reason why the Duchess who lived here as a *feme sole* should set up coverture to avoid the payment of her just debts. 2 Salk. 646.

These two last cases have already been brought partially to notice, being cited in the other cases as furnishing an argument *a fortiori* for the decision.

We now proceed to remark upon these cases and to apply the doctrine contained in them to the matter in hand. They may be divided into three classes.

In most of the cases where the verdict of a Jury has been sustained upon considerations of equity and good conscience, no rule of substantive law has been contravened by it. Most of them are only illustrations of the principle which we have cited above from Lord Mansfield. "If "it clearly appeared to us now that the plaintiffs by another form of "action could recover all they have got by this verdict, we think the "Court ought not to grant a new trial." In other words if the plaintiff is by the substantive law entitled to what the verdict gives him, we will not grant a new trial, because the rules of procedure have been violated.

The case in 2 T. R. 4 is not within the letter but quite within the spirit of this principle. The plaintiff in that case could not in any form of action have recovered what the Jury gave her, viz. damages for the suffering inflicted upon her niece. But the niece herself could have recovered those damages—that is in point of substantive law, for in fact she perhaps could not, for want of other proof than her own testimony, which according to the English rules she could not have been permitted to deliver in a suit in which she was plaintiff. And as all the evidence necessary to prove her title to them, had been given in the action brought by the aunt, the Court allowed justice to be attained irregularly and compendiously by the plaintiff undertaking to pay over to her niece the damages, after deducting the costs of the action.

The first class then is, that in which the Courts have sustained a verdict consistent with equity and good conscience, though the rules of procedure have been violated in arriving at it.

We may hope that the rules of procedure laid down for the subordinate Civil Court will never exclude the justice of the case, and consequently that no cases will occur falling within this class. If, however, any should occur, a decision according to the justice of the case will be protected, notwithstanding any irregularity in the mode of getting at it.

The case from 4 T. R. 469 is of a different kind, and comes very near in substance to a verdict against substantive law; covered, however,

as is often the case, with the disguise of a presumption of fact. The marriage in that case was invalid, but because under the circumstances it was unconscientious in the defendant to shelter himself under its invalidity, the Jury found against him, not directly affirming the validity *quoad hoc*,* of the invalid marriage, but presuming that a subsequent valid marriage had taken place.

* Buller J. seems to have thought that the verdict might be sustained upon that ground. In that point of view the case would not fall within any of our three classes.

Such presumptions as the one made in this case, must be clearly distinguished from presumptions made for the purpose of reaching the truth of a matter of fact. These last presumptions belong exclusively to the subject of evidence. But the presumptions in question are not made because the matter of fact is really believed, but because it is desired that the decision should be such as by law it would be if the matter of fact were true. In this case for example the presumption was not made because of the probability that a valid marriage had taken place—but because the assumption that such a marriage had taken place produced a state of facts upon which law and justice could pronounce the same decision,—whereas if no valid marriage had taken place, law must have said one thing and justice another. If in this case the proof of a valid marriage would have produced an unjust decision, then no such marriage would have been presumed without proof. This sort of presumption, then, does not belong, or at least does not belong exclusively to the head of evidence. It is in truth one of the artifices by which Courts of Justice have endeavoured without legislating to decide equitably in cases where the words of a law or of a contract are not what they would have been if the Legislator or the contracting parties had contemplated the particular state of facts which happens to call for a decision upon the law or contract in question.

When we come to make a Code of substantive law for the Presidencies, and for all persons in the Mofussil who may be subject to the *Lex loci* of which we recommended the declaration and enactment in our Report of 31st October 1840, we hope that we shall be able to supply the place of these presumptions by laying down general principles of Jurisprudence. In this very case Mr. Justice Buller said—" I doubt whether " it was necessary to prove a legal marriage, considering the situation " in which all the parties stood I think that a marriage in fact was suffi- " cient." This opinion (whether it be good English law or not signifies nothing to the present purpose) must have been founded upon some maxim of Jurisprudence, never perhaps expressed, but capable of being expressed. Until, however, maxims of this kind which have not been incorporated into English law, are expressed in a Code, the presumptions

of fact which are made to supply their place in the English system, may we think be usefully and consistently sanctioned.

The second class, then, may be described as those cases in which the Courts have sustained a verdict consistent with equity and good conscience, though some presumption of fact has been made or must, to sustain the verdict be made, which would not be permitted to be made (the real probability of the fact being the same) if it operated against the equity and good conscience of the case.

In the three last cases, constituting our third class, the Jury seems to have taken upon itself to mitigate the rigor of a rule of substantive law by considerations of equity and good conscience, and the Court to have refused upon the same principle to grant a new trial.

Upon this class of cases it would be sufficient at present to observe that they are not such as an unprofessional Commissioner ought to take upon himself to decide, we shall, however, before we conclude this part of our Report, take occasion to express our opinion on this kind of legislation by tribunals, whose proper function is to administer law.

The mode by which we propose to guard against the danger of erroneous decisions of the unprofessional Commissioners on the one hand, and on the other hand against the danger that substantial justice may be defeated by an appeal from unprofessional to professional Judges, is not by the introduction of any exotic principle into English judicature, but of a principle long known and acted upon in that system with very beneficial effect.

The principle is applicable also, and is applied by us, to the case of an appeal from an inferior to a superior professional Judge, but it is never applied by us where a rule of substantive Law has been infringed. In the English system it is not so applied, where the infringement has taken place by the misdirection of a professional Judge, the reason of which is well worth considering for the sake of illustration.

In Writs of Error nothing but questions of strict law come before the Appellate Court. On motions for a new trial the Court, as we have seen, does consider the question whether upon the whole justice has been done by the verdict, and in general sustains the verdict if it can decide that question in the affirmative. But there is an exception in the case where the verdict has been given in consequence of a misdirection by the Judge. The Courts will never sanction an incorrect proposition of law laid down by a Judge, though they will sanction a verdict involving

such a proposition, provided it have not been laid down by the Judge. In the case of Wilson *vs.* Rastall, Lord Kenyon says "there is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the Judge;" and a little further on "wherever a mistake of the Judge has crept in and swayed the opinion of the Jury, I do not recollect a single case in which the Court has ever refused to grant a new trial." 4 T. R. 758.

The principle of this exception, we conceive, to be that the Courts have felt that when a proposition laid down by a Judge is brought to their notice, they are bound to say either that it is law or that it is not law, and in the former case to adopt it, and in the latter to reject it, *to all intents and purposes.* If, therefore, they adopt an incorrect proposition of law laid down by a Judge, they adopt it as a rule for other cases, whereas when they sanction a verdict involving an incorrect proposition of law, the incorrect proposition avails only as regards the particular case in judgment, and forms no rule for the future.

We do not mean that the whole case affords no authority for the decision of like cases coming before the Court in the same way, for if the course adopted was proper on one occasion, it must be proper on all occasions involving the same exigency. We mean only that the erroneous proposition of law is not by this conditional sanction erected into a principle, and adopted with all its logical consequences. It is adopted so far only as it conduces to produce a decision consistent with equity and good conscience, and would no more be admitted as law in a case in which it is not required for this purpose, than those presumptions of which we have treated above, would be admitted as proof of a fact, in a case where the existence of such a fact is not required for the same purpose.

If a discretionary power to mitigate the pressure of rules of substantive Law is to be given to the Courts at all, we think it quite right that such a power should be thus limited. For every rule of law, so long as the Legislature suffers it to subsist, ought to be presumed by the Courts to be beneficial in its general operation, and therefore ought to be relaxed only in those particular cases (be they many or be they few) in which circumstances presumably not contemplated by the Legislator, would cause a strict and literal execution of his commands to work injustice.

Our Court, however, is not to be invested with any such discretionary power. It is to decide according to the substantive rules of

English Law, when they are not inconsistent with the substantive rules of English Equity; and when that is the case, according to those latter rules. If there are any cases in which a Court applying those substantive rules by means of such a procedure as we recommend, will not reach the justice of the case; we think it better to call upon the Legislature for a remedy than to give a discretionary power to the Judges.

We do not say that under no circumstances is such a discretionary power over the rules of substantive Law desirable, but only that it is not desirable under the circumstances with which we are here concerned.

We have now explained the provisions made in our system for incorporating with general judicature, the jurisdiction both original and appellate over those causes which according to the English plan are left to the uninformed equity and good conscience of Courts of Requests, unless the plaintiff chooses rather to submit to the expensive technicalities of the Superior Courts. We proceed to the consideration of a more obscure and difficult topic, viz. the incorporation of equitable with legal jurisdiction.

In the perusal of the following criticisms we beg it may be borne in mind that we have selected such cases as most forcibly illustrate the evils of separating Law from Equity generally, we have not confined ourselves to those cases which exhibit that particular portion of those evils for which we are now suggesting a remedy ; our object being not only to prove that the step we are now proposing to take is a step in the right direction, but also that the point which we intend as the terminus of our course in this direction, is the right terminus.

In our Report upon the substantive Law to which, we think, all persons in the Mofussil not subject to Hindoo or Mahommedan Civil Law, should be subject, dated 31st October 1840, we expressed a strong opinion against the separate administration of Law and Equity which obtains in the English system. We contemplate as the ultimate result of our labours upon this subject, the administration by one uniform set of Courts, of a Code composed (with additions and alterations) of the materials supplied by English Law and English Equity. This result, however, must be regarded as distant ; but the present occasion appears to be a fit one for taking a very important step towards it. The nature and extent of that step will be understood from what follows.

The subject is very intricate, and much adventitious obscurity has gathered about it from the want of accurate distinction between schemes

for investing Courts of Law with equitable powers, by means of Legislative interposition, and schemes for doing the same thing by mere judicial authority. All schemes of the latter kind must be defective, must be productive of consequences not desired by the framers of them ; because no Judge, however much disposed *ampliare jurisdictionem* for the benefit of the suitors in his Court, can venture by mere judicial authority to assume all the powers and to create all the machinery which are necessary for the effectual exercise of equitable jurisdiction. The Legislature alone can give these powers and this machinery.

The opponents of this branch of Law reform can say with truth that Lord Mansfield failed in his attempt to accomplish it ; that Lord Kenyon, Lord Eldon, and Lord Redesdale have pronounced his attempts to be extremely mischievous ; and that Mr. Justice Buller, who was his favorite disciple, is believed upon the high authority of Lord Eldon, to have recanted in his latter days when mature experience had shewn him the fallacy of his early opinions.

If these statements could neither be answered nor explained away, it would be impossible to deny that they form a very strong presumption against the success and the prudence of any such enterprize as that in which we are now endeavouring to engage the Government of India. But a careful examination of the leading cases at Law and in Equity upon which these statements are founded, will shew that they may be completely explained away, so far as regards our purpose, by the distinction above brought to view. Perhaps, also, it will appear from this examination that even the inherent deficiency of the instrument with which Lord Mansfield worked, would not have rendered the attempt so unavailing, if the zeal and industry of later Judges and Chancellors had not been so steadily exerted to counteract it. If, instead of this, Lord Mansfield's doctrines had been followed, it is probable that the public opinion on the subject would have been changed, and that the Legislature would in time have conferred the necessary powers upon the Common Law Courts. It is possible also that Lord Mansfield thought the process of attachment might be employed for enforcing any equitable jurisdiction which the Courts of Law might succeed in acquiring.

Sir James Scarlett, (now Lord Abinger,) in a communication to the Commissioners on Courts of Common Law, (from which we have borrowed some of the provisions of our scheme) published in the Appendix to their first Report, expresses himself as follows:

" The Courts of Common Law should be possessed of sufficient " power in all cases of actions properly brought before them to oblige

" the parties to do justice to each other, without having recourse to a " bill in Equity. Those who look to the history of the Common Law " from the accession of Lord Mansfield to his high station in the Court " of King's Bench will perceive, that if the same liberal and enlightened " spirit had always prevailed in the Courts of Common Law, many of " the difficulties in the way of suitors would long since have vanished; " he first allowed a defendant to have a commission from the Court for " examining witnesses abroad. The Legislature has slowly and at " length allowed the same privilege to a plaintiff." p. 655.

We proceed to the examination of the cases. Lord Mansfield finding himself frequently obliged in the Court of King's Bench to do what he felt to be unjust, and what he knew that the Courts of Equity would on that account render of no effect, looked anxiously for every occasion on which by the exercise of judicial discretion, he might assimilate the doctrines of his Court to those of the Equity Courts, and thus do justice at once to his suitors instead of driving them to seek it elsewhere at the cost of much money and much time. For this he was stigmatized by Junius as an " admirable Prætor," and by Lord Redesdale from the Bench as having " on his mind prejudices derived from his " familiarity with Scotch Law." The desire of a Judge to be saved from the necessity of doing manifest injustice might, one should think, be accounted for without having recourse to prejudices in favor of the Scotch or Roman systems. Lord Mansfield, no doubt, admired this part of those systems because he desired to decide justly, he did not desire to decide justly because he saw in those systems the means of doing so.

One occasion which presented itself to him of assimilating the decisions of his Court to the decisions in Equity, was the execution of powers of appointment.

In the case of Rattle *vs.* Popham, it appeared that upon a marriage settlement a power was given to every tenant for life, when in possession, to limit the premises to any woman he should marry, for her life, by way of jointure and in lieu of dower. The tenant for life made a lease for ninety-nine years determinable on the death of his wife. Lord Hardwicke in a Court of Law held the lease not to be warranted by the power. The widow brought her bill in the Court of Chancery, and Lord Talbot arguing from the same premises, the power and the lease, without any other circumstance, held the lease to be warranted by the power, and decreed the defendant to pay all the costs both at Law and in Equity. See 2 Strange 992. 2 Burr. 1147. 7 T. R. 480. and Cunningham 102.

Lord Mansfield thought this a very inconvenient and absurd collision of Law and Equity, and he thought moreover that on this particular subject, viz. the execution of powers of appointment, the collision was not rendered necessary, nor even justified by technical principles. He thought that powers of appointment being originally in their nature equitable, and only falling under the cognizance of Courts of Law by virtue of the Statute of Uses, whatever is a good execution of a power in Equity ought to be a good execution at law. He seems however to have been fully aware that both the legal and equitable decisions on the subject were inconsistent with this doctrine.

The short history of this matter is as follows—

In Whitlock's Case, 8 Rep. 69 b., it was laid down and agreed by the whole Court that under a power to make an estate for three lives, the donee cannot make a lease for 99 years determinable upon three lives.

This resolution of the Court of King's Bench Lord Nottingham, when Lord Keeper, declared might be laughed at. This was in the case of Smith *vs.* Ashton, Mich. 1675. In Freeman's Cases in Chancery Appendix 309, he is thus reported, "but when it doth appear that it was intended "the person should have such a power, the Court of Chancery will not "be strict in all the circumstances of executing it; and he said the reso- "lution in Whitlock's Case 8 Co. (where an estate is made for ninety- "nine years, if three lives lived so long, in pursuance of a power to make "leases for three lives) may be laughed at; and therefore although "*æquitas sequitur legem*, generally, yet sometimes *lex sequitur æquitatem*, "and the Judges of late have made larger constructions of powers, as "appears in Cumberford's Case, 2 Roll. 262."

It does not here appear with perfect distinctness whether Lord Nottingham meant that the decision in Whitlock's Case might be laughed at because it was bad law, or only because it was such law as a Court of Equity would take care to render of no effect. But enough appears to warrant us in believing that this eminent Chancellor did not (as some later Equity Judges have done) hold it to be the duty of the Common Law Judges to persist in making decisions at law which were sure to be laughed at in Equity.

It was, however, upon the authority of the resolution in Whitlock's Case that the above mentioned case of Rattle *vs.* Popham was decided at law.

Lord Mansfield's opinion upon that case and upon the subject in general is expressed in the case of Zouch *vs.* Woolston, 2 Burr. 1146.

" There is good sense in what Mr. Dunning said (Mr. Dunning was " Counsel for the defendant) that executions of powers should have the " same construction, force and effect in Courts of Law which they have in " Courts of Equity, because the Statute of Uses transferred that mode of " real property from Equity to the Common Law. Whatever is a good " power or execution in Equity, the Statute makes good at law."

This and other observations of Lord Mansfield in the case of Zouch *vs.* Woolston, gave rise to the violent assault which Lord Redesdale made upon him in the case of Shannon *vs.* Bradstreet. 1 Schol. and Lef. 52.

" Lord Mansfield had on his mind prejudices derived from his " familiarity with the Scotch Law, where Law and Equity are adminis- " tered in the same Courts, and where the distinction between them " which subsists with us, is not known, and there are many things in his " decisions which shew that his mind had received a tinge on that subject " not quite consistent with the Constitution of England and Ireland in " the administration of justice. It is a most important part of that " Constitution that the jurisdictions of the Courts of Law and Equity " should be kept perfectly distinct ; nothing contributes more to the due " administration of justice. And although they act in a great degree by " the same rules, yet they act in a different manner, and their modes of " affording relief are different ; and any body who sees what passes in " the Courts of Justice in Scotland will not lament that this distinction " prevails. But Lord Mansfield seems to have considered that it mani- " fested liberality of sentiment to endeavour to give the Courts of Law " the powers which are vested in Courts of Equity ; that it was the duty " of a good Judge *ampliare jurisdictionem.* This, I think, is rather a " narrow view of the subject—it is looking at particular cases rather than " at the general principle of administering justice, observing small incon- " veniences and overlooking great ones. On this argument of Mr. " Dunning, Lord Mansfield said that 'there was good sense in what he " said,' and that 'whatever is a good power or execution in Equity, the " Statute of Uses makes good at Law'—very good—but the Statute does " not make good at Law what was not good in Equity, but which a Court " of Equity, by its peculiar mode of acting, will make good. This " distinction Lord Mansfield was much disposed to overlook; for " example, he considered contracts for leases to be leases, and was " followed by Mr. Justice Buller. Great inconveniences ensued, which

" are now happily got rid of. A Court of Equity makes good a contract " by decreeing an actual lease; a Court of Law cannot do so. Lord " Mansfield inclined to hold a party bound by a contract not to set up " his legal title in ejectment, and so in many other instances; forgetting " what he himself had been familiar with in his practice in Equity and " that he would endanger half the titles in the kingdom.

" Mr. Justice Buller held that when a mortgage term had been once " assigned in trust to attend the inheritance, the owner of the term could " not make it a mortgage term again, and in consequence he drove the " mortgagee into a Court of Equity and produced that very mischief " which Mr. Justice Wilmot in Zouch *vs.* Woolston considered to be a " very grievous one; Lord Mansfield is represented by the Reporter in " the case of Zouch *vs.* Woolston, as having said that ' after the Statute of " ' Uses Courts of Equity reasoned as they would have done if that Statute " ' had not been made. And yet whatever is an *Equitable* ought to be " ' deemed a *legal* execution of a power; for there can be no circumstance " ' to affect a remainder-man personally in conscience when a power is not " ' duly executed, any more than the issue in tail or the successor of an " ' ecclesiastical person if a lease is not duly made.' If these words really " dropt from Lord Mansfield he must have totally forgotten all that " passed while he was in practice in Courts of Equity. This would overturn " the case of Coventry *vs.* Coventry, and all the cases on jointuring powers. " The cases of tenant in tail and of ecclesiastical persons are totally " different; there was no power to bind a remainder-man arising from " the nature of an use previous to the Statute of Uses, and as to " ecclesiastical persons, they are prevented by Statute from making leases " except pursuant to the Statute, and all leases not made pursuant " thereto are expressly made void against the successors to all intents " and purposes. The same Reporter makes Mr. Justice Wilmot say ' it is " ' much to be lamented that after the Statute of Uses the Courts of " ' Common Law had not adopted all the rules and maxims of Courts of " ' Equity.' It is scarcely to be believed that this could have fallen " from Mr. Justice Wilmot; and if Lord Mansfield found fault with the " decision in the case of Rattle *vs.* Popham, as he is represented to have " done, I think with deference that there was no ground for the remark. " I must therefore consider what is thus attributed to Lord Mansfield " and Mr. Justice Wilmot in the case of Zouch *vs.* Woolston, as of no " authority on this subject; and I think, I am warranted by the decision " in Campbell *vs.* Leach (made with the concurrence of such high " authorities as Lord Chief Justice De Grey, and Chief Baron Smyth) " in saying that a contract of this description does bind a remainder-" man."

Before we proceed to consider these objections of Lord Redesdale with reference to our own purpose, we must endeavor to clear up some of the difficulties which appear to us unnecessarily to perplex this controversy. When Lord Redesdale insinuates that the expressions attributed to Lord Mansfield and Mr. Justice Wilmot* are so absurd that it is hardly to be believed that they really could have used them, he seems to us to be under a great misapprehension of their meaning, and also to suppose that the differences between them and his own opinions were more numerous than in truth they were.

The only fundamental difference, from which all the rest are deducible, is as to what is a good execution of a Power in Equity, putting Law out of the question.

Lord Redesdale admits that whatever is a good power or execution in Equity, the Statute of Uses makes good at Law; but he implicitly denies that such an execution of a power as the lease in the case of Rattle *vs.* Popham is good in Equity. According to him it is only such an execution as a Court of Equity, by its peculiar mode of acting, will make good. Lord Mansfield, and Mr. Justice Wilmot, on the other hand, would have said, and, as it appears to us, with rigorous accuracy, that the lease was a good execution in Equity; and that the only reason why a Court of Equity acts in such cases in the peculiar mode alluded to, is for the purpose of making such an execution of a power good at Law. And consequently if the Courts of Law had (as Lord Mansfield thought they ought) held such executions of powers to be good at law by the Statute, because they were always good in Equity; there would have been no necessity for Courts of Equity to interpose with their peculiar mode of acting so far as regards the execution of powers. When Lord Mansfield held an agreement for a lease to be a lease he was proceeding on different grounds. The Statute of Uses did not help him then. He was no longer availing himself of technical principles to get at Equity in a Court of Law, but encroaching upon Equitable jurisdiction, with no other excuses than

* When Lord Redesdale said "it is scarcely to be believed that this could have fallen from "Mr. Justice Wilmot," he was perhaps only using a courteous form of expressing his abhorrence of the doctrine against which he was contending. If he really meant to express a doubt whether Mr. J. Wilmot had said what Sir J. Burrow attributes to him, we think that doubt may easily be dispelled.

In the life of Chief Justice Wilmot it is stated that "He uniformly lent Mr. Burrow his "papers with such short notes as he took himself," p. 14. It is therefore very unlikely that the Reporter should have misapprehended his meaning.

But there is independent evidence that the opinion in question, viz. that "it is much to be "lamented that after the Statute of Uses the Courts of Common Law had not adopted all the

the desire of doing justice, the equitable origin of the purpose to which the action of ejectment has been applied, viz. that of recovering the land, and the doctrine that ejectment, being a fictitious action invented by the Courts, no party ought to be permitted to prevail in it against good conscience. But in his doctrine respecting the execution of powers, he was able to deduce the conclusions at which he desired to arrive, from the letter and spirit of the Statute of Uses, that Statute having converted a large portion of Equity into Law. We do not think it necessary to quote any of the numerous Equity Cases in which it is distinctly laid down that such an execution of a power as the one in question, is good in Equity. It would, indeed, be sophistical to quote them against Lord Redesdale; for he of course did not mean to dispute the proposition as it is used in those cases, but only to explain it. To shew (that is) that when the authorities say a *good execution in Equity* they mean an execution which will be made good in Equity by the mode of acting peculiar to the Courts administering that system. That is the real question on which Lord Mansfield's opinion and Mr. Justice Wilmot's are to be set against Lord Redesdale's, and it is not properly a question of English Equity, but a question of General Equity, and one of which none of the English Equity Cases afford any solution. It could not, indeed, ever arise for practical solution in any English Court of Equity. It could only arise for practical solution in a country where there are no Courts but Courts of Equity.

"rules and maxims of Courts of Equity," was in accordance with, or rather was only a particular case of the general opinion which Chief Justice Wilmot entertained upon the English system of Law and Equity. In the case of Collins *vs.* Blantern he is reported to have used the following words:

"The third point is whether this matter can be pleaded. It is objected against the defen-
"dant that he has no remedy at Law, but must go and seek it in a Court of Equity; I answer,
"we are upon a mere point of Common Law, which must have been a question of Law long before
"Courts of Equity exercised that jurisdiction which we now see them exercise: a jurisdiction
"which never would have swelled to that enormous bulk we now see, if the Judges of the Courts
"of Common Law had been anciently as liberal as they have been in later times; to send the
"defendant in this case into a Court of Equity, is to say that there never was any remedy at Law
"against such a wicked contract as this is: we all know when the Equity part of the Court of
"Chancery began. I should have been extremely sorry if this case had been without remedy at
"Common Law. *Est boni judicis ampliare jurisdictionem;* and I say *est boni judicis ampliare*
"*justitiam;* therefore whenever such cases as this come before a Court of Law, it is for the public
"good that the Common Law should reach them and give relief. I have always thought that
"formerly there was too confined a way of thinking in the Judges of the Common Law Courts, and
"that Courts of Equity have risen by the Judges not properly applying the principles of the
"Common Law, but being too narrowly governed by old cases and maxims, which have too much
"prevented the public from having the benefit of the Common Law." 2 Wils. 350.

The question stated generally is this. When A is bound in conscience (as for example by having contracted) to make a good title to B why does a Court of Equity direct him to execute a conveyance? Is it for the purpose of conferring upon B a good title both at Law and in Equity, or merely a good title at Law? We conceive it is for the latter purpose only.

So little has this part of the theory of our legal constitution been considered, that as far as we know the only authorities on it are, first, that of Lord Mansfield and Mr. Justice Wilmot themselves in this case of Zouch *vs.* Woolston, and some other cases (if we are not mistaken in supposing that this doctrine is involved in them) and secondly, that of Professor Austin, in his notes to the Table containing "The "arrangement, which was intended by the Roman Institutional Writers "(according to the opinions current amongst Civilians from the latter "portion of the 16th to that of the 18th century.)"

"According to English *Equity*, says Mr. Austin, (i. e. according to "the law which certain of our Courts administer) a sale and purchase "though it is styled a *contract* imparts to the buyer, without more, "*dominion* or *jus in rem.* In the technical language of the system, "what is agreed to be done is considered as done. The subject of the "sale is his, as against the seller specially; and the subject is also his as "against the world at large. The only interest in the subject which "remains to the seller, is a right in re *alienâ:* a mortgage or lien expressly "or tacitly created, to the end of securing the equivalent for which he "has aliened.

"But according to the antagonist system which is styled pre-emi-"nently *Law* a sale and purchase, without more, merely imparts to the "buyer jus *ad* rem. The seller is obliged by the sale to transfer the "subject to the buyer, and, in case he break his obligation by refusing or "neglecting to transfer, the buyer may sue him on the breach, and recover "compensation in damages. But that is the extent of the right which the "sale imparts. The property or dominion of the subject still resides in "the seller, and, in case he convey the subject to a third person, the "property or dominion passes to the alience.

"Now, if the antagonist *Law* were fairly out of the way, the right "of the buyer according to *Equity* would stand thus. Unless the seller "refused to deliver the subject, and the buyer, in that event, were satisfied "with his right to compensation, the sale and purchase, though styled a "contract, would give him completely and absolutely *dominion,* or jus *in*

" *rem.* He could vindicate or recover the subject as against the seller " himself, and as against third persons who might happen to get the " possession of it. The so-styled contract would amount to a perfect " conveyance.

" But, by reason of the dominion or property which remains to the " seller at *Law*, the sale and purchase even in *Equity*, is still imperfect as " a conveyance. In order that the dominion of the buyer may be com- " pleted in every direction, something must be done on the part of the " seller. He must pass his *legal* interest in *legal* form. He must convey " the dominion or property which still resides in him *at Law*, according to " the mode of conveyance, which *Law* in its wisdom exacts.

" To this special intent or purpose, the buyer, even in Equity, has " merely jus *in personam*, or (borrowing the language of the Roman " Lawyers) the subject of the sale, even in Equity, continues *in obliga-* " *tione.*"

" Speaking generally, the buyer in contemplation of Equity, has " dominion or jus *in rem*, and speaking generally the sale, in Equity, is " therefore a conveyance.

" But, to the special intent or purpose which is mentioned above; " the buyer has jus *in personam*, or (changing the shape of the expres- " sion) the seller remains obliged. This right *in personam certam* and " this corresponding *obligation*, Equity will enforce in specie. And in " respect of this right *in personam*, and of this corresponding *obligation* " the sale, even in Equity, is properly a *contract.*"

This is a very explicit statement of the general doctrine of English Equity, and, if it is also a correct one, it follows, with regard to the execution of powers for meritorious consideration, that, as soon as the Statute of Uses had put " the Antagonist *Law* fairly out of the way," every Court in the country ought to have held that such an execution of a power as was, speaking generally, a conveyance in Equity before the Statute, and only not a conveyance in Equity for the special purpose of enforcing the obligation to make such a conveyance as " *Law* in its wisdom exacts," every Court in the country, we say, ought to have held such an execution to be a perfect conveyance to all intents and purposes.

Now if this doctrine be kept in view in the examination of the dispute about the execution of powers, it will be seen that (be the doctrine correct or incorrect) Lord Mansfield knew perfectly well what he was

about, that there is no ground for accusing him of having forgotten all that passed while he was in practice in Courts of Equity, and of overturning all the cases on jointuring powers, nor for assuming that he held a contract of the sort in question not binding on a remainder-man.

Sir E. Sugden in his work on powers adopts Lord Redesdale's view of the question of general Equity and also his two suppositions, first, the supposition that Lord Mansfield was altogether forgetting that question, whereas we believe that it was distinctly present to his mind, and that all his conclusions are logically deduced from it, and secondly, the supposition, which we believe to be equally unfounded, that Lord Mansfield thought his doctrine, that the execution of powers should receive the same construction at Law as in Equity, was in accordance with the course which, under the existing circumstances, Courts of Equity had adopted.

On the question of general Equity and on the supposition that Lord Mansfield had neglected it, Sir Edward Sugden merely adopts what Lord Redesdale had said. But with respect to the other supposition he observes "Lord Mansfield adduced this decision of Lord Talbot's (the "decision in Equity in Rattle *vs.* Popham) in support of his favourite doc-"trine, that whatever was an equitable, ought to be deemed a legal execu-"tion of a power. In a late case before Lord Redesdale, in which he "combated this doctrine, he said that if Lord Mansfield found fault "with the decision in the case of Rattle *vs.* Popham, as he was repre-"sented to have done, he (Lord Redesdale) thought with deference "that there was no ground for the remark, and indeed, notwithstanding "Lord Mansfield's assertion, it appears from a manuscript note of the "case, which will be found in the Appendix to this volume, that Lord "Talbot, admitted clearly that the power was *not* well executed *at law*, "but he relieved the wife against the defective execution on the general "rule of Equity."

Now there is no assertion of Lord Mansfield inconsistent with this version of the case. He never meant to say that Lord Talbot found fault with the decision at law. He did *not* adduce the case in support of his own favorite doctrine, but for the purpose of shewing what mischiefs had ensued because Courts of law had omitted to adopt that doctrine, and had thus driven Courts of Equity to deal with these cases just as if the Statute of Uses had never been enacted.

All this derives strong confirmation from what Lord Mansfield himself afterwards said in the case of the Earl of Darlington *vs.* Pulteney.

" It is very difficult to maintain on any principle of law, reason or " convenience, a distinction between *equitable* and *legal* executions of " powers, which were originally in their nature, equitable, but they are by " the Statute of Uses transferred to Common Law. Mr. Kenyon has said " very truly, that at Common Law, powers were unknown. They were " modifications of trusts, and directions to the Trustees which bound his " conscience and which he was compellable in a Court of Equity to execute. " The Statutes of Uses transferred entirely all that was equitable into a " legal modification; and the Courts of Law were then bound to ask what " was the Equity. It has likewise been very truly said, that there were few " cases upon the execution of powers before the Statute 27. II. 8. C. 10. " and none have come down to our time by way of precedents. Powers, " therefore, being a new thing, and the Courts of Law having no equitable " precedents in point to guide them, compared them at first to conditions " which they are not at all like; and consequently held that they should " be construed strictly. They looked upon them in the lights of powers " vested in a third person over the Estate of another man; whereas in " fact they are only a different species of ownership, and enjoyment " of property. But a long series of precedents has now settled in the " Court of Chancery, that in the construction of powers, wherever " the power is executed for a *meritorious* consideration, namely, as a " provision for a wife or child, or for the benefit of creditors or " purchasers, there the precise form prescribed for its execution need not " be strictly pursued, and if it is now settled, it is settled on principles " that existed before.

" That being the case, Court of Law ought to follow Equity; " because there should be a general rule of property: and, if the Courts of " Equity say, we will presume that when the execution is for a meritorious " consideration, a strict adherence to the precise form was not intended, " and therefore it is not necessary; the moment the same rule is fixed " and adopted at law, every man who creates, and every man who is to " exercise a power, understands what he is to do. In the construction " of powers *originally* in their nature *legal*, Courts of Equity must follow " the Law; be the consideration ever so meritorious: for instance " powers by a tenant in tail, to make leases under the Statute, if not " executed in the requisite form, no consideration ever so meritorious " will avail. So with respect to powers under the Civil List Act, powers " under particular family entails, as the case of the Duke of Bolton, &c.; " Equity can no more relieve from defects in them than it can from " defects in a common recovery. The principle upon which the rule of " Construction in these cases is founded is, that there is nothing to affect " the conscience of the remainder-man. Therefore it is difficult upon

" principles to maintain any distinction between equitable and legal " execution of powers." Cowp. 266.

It is remarkable that Lord Redesdale takes no notice of this case. Yet, if Lord Mansfield's reasoning in it is considered with care and without a disposition to find him in the wrong, his meaning can scarcely be misapprehended. His doctrine and that of Mr. Justice Wilmot unaltered in substance, but shaped so as to obviate the misunderstanding to which it has been subjected, may perhaps be thus expressed.

As soon as the Statute of Uses had passed, Courts of Law were bound to ask what was the Equity, because the Statute said that the Law should follow the Equity. But unfortunately having no Equity precedents to guide them, they took a wrong direction, and, comparing powers to conditions, which they are not at all like, held that they should be construed strictly. A long series of Equity precedents has now settled that wherever the power is executed for a meritorious consideration, the precise form prescribed for its execution need not be strictly pursued. It is true these precedents are all since the Statute of Uses; but they proceed on principles of Equity that existed before the Statute, principles therefore which the Courts of Law ought to have adopted immediately upon the passing of the Statute. If they had done so, there would now be a general rule of property. A clear intention to execute a power for a meritorious consideration appearing in writing, would be a good execution of the power both in Equity and at Law. There would be no occasion for Courts of Equity to exercise in these cases their peculiar authority of compelling a party to do what in conscience he ought to do. They have only been driven to exercise that peculiar authority by the mistake which Courts of Law made in not adopting equitable principles after the Statute, neither would there be any occasion to adopt the questionable doctrine that a remainder-man is bound in conscience to do what the particular tenant ought in conscience to have done ; for the remainder-man in these cases would be bound in Law by what the particular tenant had actually done ; and " the case of Coventry *vs.* Coven- " try, and all the cases on jointuring powers," so far from being overturned, would thus rest on a more intelligible and secure foundation.

This, as it seems to us, was the doctrine of Lord Mansfield and of Mr. Justice Wilmot to which they desired to bring back the Courts wherever they were not bound by express decisions. But they never meant to say that their doctrine had been adopted even by Courts of Equity. On the contrary Lord Mansfield expressly says that after the Statute of Uses Courts of Equity reasoned as they would have done if

that Statute had not been made. That is to say finding that, notwithstanding the Statute, Courts of Law did not inquire what was the Equity and follow it, and that the Statute was therefore *pro tanto* a dead letter, they had no other means of enforcing Equity but by doing as they would have done before the Statute, that is to say, by decreeing such formal assurances, or adopting such other modes as would protect the parties from the effect of the erroneous doctrine adopted by the Courts of Law.

We have now shewn perhaps that Lord Mansfield and Mr. Justice Wilmot were technically right in thinking that a clear intention to execute a power for a meritorious consideration appearing in writing, is actually a complete execution in Equity, putting law out of the question. But at all events we have shewn that Lord Mansfield and Mr. Justice Wilmot assumed that proposition, and that, if it be assumed, their whole doctrine is coherent and intelligible ; at variance with the decisions at Law, and even with the decisions in Equity so far as these last admit the correctness of the decisions at Law, but in other respects not subversive but confirmatory of them.

It was necessary to clear away the obscurity which hangs over this controversy before we could say with confidence, as we now can, that (with one exception to be presently noticed) none of Lord Redesdale's or Sir E. Sugden's arguments against permitting Courts of Law to adopt equitable doctrines, apply to our plan. Those arguments all depend upon the inability of Courts of Law to compel specific performance ; but the Court we are recommending is to have that power.

In another point of view the long discussion into which we have been led, has a practical value directly applicable to the general purpose of this Report. For we believe that nothing is more calculated to throw light on the somewhat abstruse subject of English Equity than a careful examination of this remarkable controversy.

It is most probable, as we have already hinted, that Lord Mansfield, if he had succeeded in making his doctrine the practical rule of the Courts of Law, intended either to procure from the Legislature an express authority to compell specific performance, or to use the power of granting an attachment, which is inherent in the Courts of Law, for the accomplishment of that purpose. But however this may be, the arguments of Lord Redesdale (with one exception) have no application to any Court which is effectually in possession of such a power.

The exception is the argument drawn from the alleged defects of the Scotch Courts, and it is a mere sophism.

The Scotch Courts are bad. The Scotch Courts administer Law and Equity together. Therefore Courts which administer Law and Equity together are bad.

Not only is the argument vicious, but the viciously deduced conclusion is a different proposition from the conclusion aimed at by all the sound arguments which Lord Redesdale employs.

The conclusion deduced from the vicious argument is, that Law and Equity cannot be properly administered by the same Courts.

The conclusion aimed at by the sound arguments is, that Equity cannot be properly administered by a Court not furnished with powers and machinery like those of the English Courts of Chancery and Exchequer.

This difference, glaring as it is, was not perceived by Lord Redesdale himself (for we cannot suppose that he intended to mislead) and consequently he has not pointed it out. The result is that among Lawyers, and that large class who take their opinions upon such subjects from Lawyers, an opinion prevails that Lord Redesdale has shewn the project of administering Law and Equity in the same Court to be a plausible but shallow scheme which cannot bear the test of a learned and searching inquiry.

The next of Lord Mansfield's attempts to introduce Equity into a Court of Law which we shall notice, is the case of Weakly *Ex dem.* Yea *vs.* Bucknell, Cowp. 473. Sir Wm. Yea had agreed to grant the defendant a lease for 21 years from Lady Day 1758. The defendant had been in possession and paid the rent for 18 years, but no lease was ever granted, or demanded by the defendant. On the 13th September 1775, notice in writing was given by the Lessor of the plaintiff "to quit at Lady Day 1776." The question was whether the Lessor of the plaintiff was entitled to recover.

Lord Mansfield stopped Mr. Gould, who was about to argue for the defendant, saying there was no occasion to give himself any trouble in so plain a case.

He then adverted to the want of a stamp (a matter foreign to our purpose) and proceeded thus: "It is an agreement for a lease for 21 "years; and the defendant has been in possession *eighteen* of them. "Then the Lessor of the plaintiff gives notice to quit and brings an "Ejectment. He has agreed for a valuable consideration not to give "notice. Shall he then give notice? There might be circumstances "perhaps which might let him in to maintain an Ejectment. For "instance if he had tendered a lease and the defendant had refused to "execute it, whereby the plaintiff had incurred a loss. But here there "is no such circumstance; and if the Court were to say this Ejectment "ought to prevail, it would merely be for the sake of giving the Court "of *Chancery* an opportunity to undo all again. If the Lessor of the "plaintiff should recover at Law, Equity would immediately set it right, "and he would be obliged to pay the costs of both suits."

This doctrine was not approved of in England, and the contrary seems to have been considered as established in the case of Yea Bart. *vs.* Rogers, which was argued before all the Judges in the Exchequer Chamber. A second argument was awarded, but the case was never brought before the Judges again. "As I collected at the time says "Mr. East (now Sir E. H. East) Lord Loughborough, Chief Justice, "Gould, Ashurst and Buller, Justices, were of opinion, that the defend- "ant's equitable title might be set up as a defence to the Ejectment. "Lord Kenyon, Chief Justice, Eyre, Chief Baron, and Heath, Justice, "were decidedly of a different opinion: and with these it is probable "that the other Judges coincided; though I have no authority for "saying so; and no public opinion was ultimately delivered on the case. "But that an Equitable Title cannot be set up in Ejectment has ever "since been considered as settled. See 5 East's Reports, 138 N. (*a.*)

In this manner Lord Mansfield's Equitable doctrines respecting agreements for leases were quietly got rid of in England. In Ireland their fate was somewhat different. There they appear to have been followed by the Courts, but to have called forth a very vehement protest from Mr. Justice Kelly in the case of Lessee of Lord Massey *vs.* Touchstone. 1 Scho. and Lef. 67 n. (*c.*)

The action was an Ejectment. Lord Massey had agreed "to set "the farm of Knockmore to the said Bennett and Touchstone jointly and "severally for the term of three lives to be named by them at the rent and "on the terms mentioned in the within and above proposal (a proposal "containing the terms) to commence on the first day of May next. "Leases to be perfected at the request of either party."

Lord Carletone, Chief Justice, and the other two Judges, relied upon the distinction between a clear and a doubtful Equity, holding this to be of the latter sort, and declining to give any opinion on the question, whether if there had been a clear Equity for the defendant, it would have availed him.

Mr. Justice Kelly delivered his opinion as follows:

"I could wish that the learned Lord (Lord Yelverton) who deli-
"vered his opinion upon this case at *Nisi Prius* had had an opportunity
"of considering his own judgment; and I am sure he would now have
"decided this question in another manner; but he had the authority of
"a very great Judge and it misled him. Let us consider a moment
"whether it would not subvert all the rules of discrimination between
"Law and Equity, if we were to say that this verdict ought to stand.
"Lord Carleton with his usual cautious discretion, has declined entering
"into a consideration of the authorities on which the argument is
"founded; but I will do so; for the very first time I ever read that case
"of Yea *vs.* Bucknell, in Cowper, I was astonished at it and saw that it
"would be a decision productive of very great mischief. It is admitted in
"this case that the plaintiff has a clear legal title, and that the defendant
"has no legal title, but merely an equitable one: then it becomes a
"question (and till the decision in Yea *vs.* Bucknell it never was a
"question) whether a legal title should succeed in a Court of Law
"against no legal title. I have some experience in these Courts and
"before Cowper's Reports were published in this country, I will
"venture to say that no attempt to set up an equitable defence in
"Ejectment, where the plaintiff's title was clear at Law, was ever
"made. See the consequences that follow from the practice. The
"defendant has an equitable title only, if the plaintiff cannot recover
"at Law, that title will remain a good defence to the defendant
"for ever, in every Ejectment brought by the plaintiff, unless the
"Court of Law shall make itself a Court of Equity: if the defence
"is good now it will be good twenty years hence: then see the situation
"of the lessor of the plaintiff. He cannot recover; the defendant holding
"possession, pays him no rent, names no lives, and yet remains in pos-
"session unless the plaintiff goes into a Court of Equity; was there ever an
"instance where a man who wanted a specific execution was permitted to
"drive the person having the legal title, into Equity. Where a man having
"a legal title, was forced into Equity against a person having barely an
"equitable title. In this very case for example, see how principles
"would be subverted. Suppose the defendant were driven into a Court
"of Equity, he might go thither with a clear case to entitle him to

" relief; but if the plaintiff is driven into Equity, the defendant lies " under no difficulty if he can only prove his article, whereas the plain- " tiff cannot succeed, for a Court of Equity will dismiss his bill and tell " him 'your title is at law; go into a Court of Law,' and then it will " come to this, that the plaintiff will not be relieved either at Law or " in Equity; at Law this article bars him; and having a title at Law, " he cannot go into Equity."

These consequences are certainly of a startling kind, but that they are deducible from any doctrine of Lord Mansfield understood in the sense in which he intended it to be understood, cannot be admitted. Mr. Justice Kelly, indeed, only asserts that they are so deducible 'unless 'the Court of Law shall make itself a Court of Equity.' But he must have known perfectly well that Lord Mansfield did intend to this extent to make his Court a Court of Equity, and therefore the elaborate exposition he gives of the absurd consequences which would have followed if Lord Mansfield had meant what he did not mean, was, to say the least, unnecessary.

" If the defence is good now it will be good twenty years hence." True, if the circumstances remain the same.

" Then see the situation of the Lessor of the plaintiff. He cannot " recover; the defendant holding possession, pays him no rent, names no " lives and yet remains in possession unless the plaintiff goes into a " Court of Equity." So says Mr. Justice Kelly. But what would Lord Mansfield have said? We know what he would have said not only from the reason of the thing, but from what, for the purpose of guarding against this very misapprehension, he actually did say in the case of Yea *vs.* Bucknell. " There might be circumstances perhaps which might let " him in to maintain an Ejectment. For instance if he had tendered a " lease and the defendant had refused to execute it, whereby the plaintiff " had incurred a loss." From this it is quite manifest that in the events supposed by Mr. J. Kelly, Lord Mansfield would have said " The " defendant names no lives and thereby prevents the lessor of the " plaintiff from performing his agreement. The defendant pays no rent " and thereby the lessor of the plaintiff has incurred a loss. These " circumstances let him in to maintain an Ejectment notwithstanding " the agreement which would otherwise have barred him."

This branch of Mr. J. Kelly's attack fails, then, entirely for want of a foundation. We proceed to consider the remaining branch which relates to the supposed incompetence of a Court of Law to appreciate the Equity in such cases.

" I have heard a distinction mentioned (it is in one of the English " cases) between a clear Equity and a doubtful Equity. I would be glad " to know how it is possible for a Judge sitting in a Court of Law to say " that any thing is a clear Equity. That is a matter that depends on all " the facts of the case, and not on the instrument: a Judge in a Court " of Law has nothing to do with Equity; he must leave it to its proper " tribunal, he cannot form an opinion without going into all the circum- " stances of the case, and would a Court of Law permit a defendant to " go into all the evidence in the case necessary to shew that he had what " is called a clear Equity? For instance in this case to prove that all the " particulars of this Article were performed. See what a scene of evidence you " must go into. Further, the Judge at *Nisi Prius* in this case could not " say the defendant's title is equitable, unless he lets the plaintiff go into a " case to shew that it is not; then the plaintiff must come prepared to " examine witnesses as to every circumstance in the equitable agreement. " Thus the Judge makes himself a Judge of Equity in a Court of *Nisi* " *Prius* and leaves it to the Jury to determine whether the defendant is " entitled to a specific execution."

The zeal of this defence of the sacred boundaries between Law and Equity appears to us much more conspicuous than the discretion. Mr. Justice Kelly seems entirely to have forgotten that the agreement in this case and all the circumstances of performance and non-performance are beyond all question the proper, legitimate, constitutional subjects of Common Law Jurisdiction. If the defendant in this case had brought an action against Lord Massey for a breach of his agreement to grant a lease, nothing is more certain than that the Judge and Jury at *Nisi Prius* must, in order to say whether there was any breach of the agreement and to estimate the damages, have gone into all that scene of evidence which is here represented as being altogether beyond their power and their competence.

The whole of this argument of Mr. Justice Kelly is a fallacy based upon the groundless assumption that this agreement, and the performance or non-performance of it, are matters exclusively for the cognizance of Courts of Equity. He calls it an " Equitable Agreement." It is not an equitable agreement. It is a strictly legal agreement. All that is equitable in the matter, all that can with any color of reason be alleged to be beyond the competence of a Court of Law, is the title to the land arising out of the legal agreement.

The fallacy of Mr. Justice Kelly's argument may be placed in a still more striking light by considering the foundations of the power assumed

by the Courts of Equity to compel specific performance. Great legal authorities have looked upon the assumption as an unwarrantable intermeddling with things which are the proper subjects of legal cognizance. In the case of Bromage *vs.* Jennyng Roll, Rep. 368, pl. 21., the Court of King's Bench granted a Prohibition to the Marches of Wales to prevent a suit in Equity upon a promise for good consideration to make a lease, because the party might have an action upon the case at Common Law. "And it being urged that this was usually done in Chancery, "Coke, Doddridge and Haughton replied that without doubt a Court of "Equity ought not to do so, for then to what purpose is the action "upon the case and covenant? And Coke said this will subvert the "intent of the Covenantor, when he intends to have it at his election, "either to lose the damages, or to make the lease, whereas here they "would compel him to make the lease against his will; and so it is if "a man be bound in a bond to infeoff another, he cannot be compelled "to make a feoffment; and by Doddridge if a decree be made that he "should make a lease, and he will not do it, there is no other remedy "but to imprison his body, and the Serjeant who moved it, confessed "that he did it against his conscience by reason of the use," and a prohibition was granted accordingly.

The objection here made to the remedy of specific performance, viz. that it renders useless the Common Law remedies by action on the case and covenant, is now justly exploded; but that such an objection should ever have been made by great Lawyers shews in a peculiarly forcible manner how perversely wrong it is to treat an agreement to make a lease as a subject matter belonging exclusively to Courts of Equity.

Courts of Equity themselves hold no such doctrine as this. They hold doctrines strikingly inconsistent with it. Before Lord Somers's time they would not even entertain a suit for specific performance of an agreement until the plaintiff had first recovered damages at Law for the breach of it. According to Mr. Justice Kelly Courts of Law are incompetent to perform the investigation which is necessary to determine whether a party asking for specific performance of an agreement, has a clear Equity. According to the Chancellors who preceded Lord Somers not only are the Courts of Law competent to this investigation, but they are the only Courts which are competent to it. They held this investigation in a Court of Law to be the indispensible preliminary to their equitable interference.

This doctrine it is true has received two considerable modifications in modern times. But taken with these modifications, the doctrine

though a less striking, remains in substance an equally strong argument against Mr. Justice Kelly's views.

The first modification was that, after Lord Somers's accession to the Woolsack, the Chancellors instead of insisting that the plaintiff should actually recover damages at Law before he could claim equitable relief, thought it sufficient to determine themselves whether the plaintiff would be entitled to damages at Law. See the observation of Sir Thomas Clarke, M. R., in the case of Dodsley *vs.* Kinnersley. Amb. 406.

The second modification is thus described in argument by the Counsel in the case of Williams *vs.* Steward 3 Merivale 481. " There are cases " undoubtedly where the Court will maintain the bill, notwithstanding " some formal objection which would preclude the party at Law, as the " lapse of time, &c. But the true distinction is, that the subject matter " must be such as would enable the party to recover in damages; but " where the subject matter is otherwise, a Court of Equity cannot " interfere."

We will not undertake to say whether this distinction reconciles all the cases. The subject is discussed by Mr. Fonblanque in a Note to the Treatise of Equity, Vol. I. p. 151, Note *(c.)* and treated by him as doubtful; but all that is necessary for the purpose of our argument seems well established, viz. that where there is a *legal* agreement and no formal objection which would preclude the party at Law, a Court of Equity will not decree specific performance unless it is satisfied that the party is under the circumstances entitled to damages at Law.

That is, the Courts of Equity hold that in such cases the question whether there is a clear Equity depends upon the question whether there is a clear title to damages at Law.

Mr. Justice Kelly's objections to Lord Mansfield's doctrine have therefore no validity whatever. The only valid objection to it is, that a Court of Law has not the power to decree specific performance nor any equivalent power.

When we say the only valid objection, we mean the only valid objection drawn from considerations of utility and convenience, for with regard to mere technical considerations, it must be admitted that Lord Mansfield was guilty of innovation in this matter. If, however, the nature and history of the Action of Ejectment, and in particular the nature and history of the execution in it, is considered, it will appear that his

doctrines harmonize much better therewith than the doctrines of his predecessors and successors. In the first place, the Action of Ejectment is fictitious, and it is a general principle that fictions are only permitted to be used for the purpose of obtaining justice, and not for the purpose of doing injustice. But secondly, the execution in Ejectment so far as the possession of the land is obtained by it, was borrowed by the Common Lawyers from the Courts of Equity.

There is some doubt as to the exact period of this change. The following is Sir William Blackstone's account of it: "When the Courts "of Equity began to oblige the Ejector to make a specific restitution of "the land to the party immediately injured, the Courts of Law also "adopted the same method of doing complete justice; and in the prose- "cution of a Writ of Ejectment, introduced a species of remedy not war- "ranted by the original Writ nor prayed by the declaration (which are "calculated for damages merely and are silent as to any restitution) viz. "a judgment to recover the term, and a Writ of possession thereupon. "This method seems to have been settled as early as the Reign of Edward "IV. though it hath been said to have first begun under Henry VII. "because it probably was then first applied to its present principal use, "that of trying the title to the land." Comm. 3. 200.

Now it seems manifest that if the Common Lawyers introduced this kind of execution into the Law, for the purpose of sparing the party the trouble and expence of two suits instead of one, if they gave possession of the land because they knew that if they did not the Courts of Equity would; *a fortiori* ought they to have refused possession to the lessor of the plaintiff in those cases in which they knew that the Courts of Equity would take it away from him and restore it to the defendant. When, therefore, Lord Mansfield remarked "if the Court were to say this Eject- "ment ought to prevail, it would merely be for the sake of giving the "Court of Chancery an opportunity to undo all again;" he spoke not only in the spirit of reason and justice, but also in the spirit of those ancient Lawyers who first turned the Action of Ejectment into a means of recovering possession of the land.

The next example we shall give of Lord Mansfield's attempts in this kind, is his using the action for money had and received as a Bill in Equity for the purpose of relieving a party from the consequences of a judgment given in an inferior Court, which from defect of jurisdiction had not been able to go into the whole case. He did this in the case of Moses *vs.* Macfarlan, Burr. 1005. We had occasion to advert to this case

in the part of this Report which treats of the mode of correcting the errors of inferior Courts, and we shall have occasion to advert to it again in the Report which treats of special pleading. But the present is the proper place for bringing to view the main doctrine contained in the case, and the objections which have been made to it. In the course of this examination it will be seen that the principle of giving to one Court jurisdiction over only part of the facts of a case, compelling it to decide upon such imperfect grounds, and then correcting the mischievous effects of its decision by calling in the aid of another Court which is empowered to go into the whole case, seemed pregnant with absurdity even to a great English Lawyer, not of Lord Mansfield's School, when presented to his mind as a novelty. In this instance too, as in so many others, Lord Mansfield does not appear to have been fully understood.

Macfarlan sued Moses in the Court of Conscience, as indorser of a small Bill of Exchange, and recovered against him there, notwithstanding an agreement into which he had entered that Moses should not be liable to pay the money by reason of his indorsement. The Court of Conscience refused to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge of it, and gave judgment against Moses upon the mere foot of his indorsement (which he himself did not at all dispute) without hearing his witnesses about the agreement that he should not be liable: for the Commissioners held this agreement to be no sufficient bar to the suit in their Court.

Lord Mansfield in giving judgment said " it is most clear that the " merits of a judgment can never be overhaled by an original suit either " at Law or in Equity. Till the judgment is set aside, or reversed, it is " conclusive as to the subject matter of it, to all intents and purposes."

" But the ground of this action is consistent with the judgment of " the Court of Conscience, it admits the Commissioners did right. They " decreed upon the indorsement of the notes by the plaintiff, which " indorsement is not now disputed. The ground upon which this " action proceeds was no defence against that sentence."

At the word " consistent" in the above passage the Reporter says in a Note " Qu. of this? for how can it be legal for any Court of Law to " give judgment for a plaintiff to recover a sum which, as soon as paid, " the defendant hath a legal right to recover back again, and that on the " very same facts as in the former suit."

Upon this query we observe, first, that Lord Mansfield would not have said that the defendant had a *legal right*, but an equitable right

which in this equitable action might be enforced in a Court of Law. The defendant had a *legal right* (Lord Mansfield would probably have said) to recover damages for the breach of the agreement, and an *equitable right* to recover back the money which, in breach of the agreement, he had been forced to pay; and secondly, that the defendant did not recover it back again on the very same facts as in the former suit. For the fact of the agreement was not before the Commissioners, they having refused to receive evidence of it.

"It is enough for us, Lord Mansfield continues, that the Commis-
"sioners adjudged they had no cognizance of such collateral matter.
"We cannot correct an error in their proceedings, and ought to suppose
"what is done by a final jurisdiction to be right. But we think the
"Commissioners did right in refusing to go into such collateral matter,
"otherwise by way of defence against a promissory note for 30 *s.*, they
"might go into agreements and transactions of a great value, and if
"they decreed payment of the note, their judgment might indirectly
"conclude the balance of a large account."

To this again the Reporter appends a note containing the following passage: "the above reasoning seems to be contradictory to itself and "is really a contradiction in terms: for it is saying a man has a right, "which the moment he has received, the person paying it has a right to "recover back, which is a right and no right." The contradiction will vanish if we say that one party has a *legal* right and the other an *equitable* right. The absurdity will remain, it is true, of having *legal* rights inconsistent with *equitable* rights, but this Lord Mansfield could not help; and we (much as we object to such arrangements,) are nevertheless of opinion that if there are to be rights inconsistent with Equity and jurisdictions which are to enforce them, equitable rights and jurisdictions to enforce them are a necessary complement of that system.

The opinions of the Reporter are understood to have been shared by a considerable portion of the profession, but the most weighty expression of disapprobation is to be found in the judgment delivered by Lord Chief Justice Eyre in the case of Philips *v.* Hunter, 2 H. Bl. 414. The arguments used by him are very forcible. They are indeed conclusive, not as it seems to us against the equitable relief given by Lord Mansfield under the circumstances of the case, but against any such parcelling out of jurisdiction as renders equitable relief necessary for the purposes of justice, or in other words against setting up a Court which is prohibited from doing complete justice in the cases which come before it.

" In the argument of the case it is distinctly admitted that the " merits of a judgment can never be overhaled by an original suit either " at law or in equity, that till the judgment is set aside or reversed, it is " conclusive as to the subject matter of it, to all intents and purposes. " An attempt is made to distinguish between the judgment and the " ground of that action, I think not with much success. The proposi- " tion that the ground upon which the action proceeded, was no defence " against the sentence can hardly be maintained. Suppose it had been " a suit in the Court of King's Bench, instead of a Court of Conscience, " would it have been a defence? If it would why not in a Court of " Conscience ? Is there to be a recovery in a Court of Conscience only " to be overturned by an action in the King's Bench? It is said they " might go into agreements and transactions of great value, doubtless " they might, if those transactions give a defence against a debt of which " they have jurisdiction. Is it not necessarily incident? The true " objection if there be an objection, is that such Courts ought to have no " jurisdiction at all, because the jurisdiction, if they have it, will draw to " it cognizance of matters of which they must be very incompetent " judges. It may be questionable whether a set-off of a debt arising " out of their jurisdiction can be pleaded or used; but that does not draw " into question the truth of the proposition, that every thing that goes " to the essence of the debt demanded, must of necessity be within their " jurisdiction. To say that the merits of a case determined by the " Commissioners, where they had jurisdiction, never could be brought in " question over again in any shape whatever, and to say that yet the de- " fendant ought not in justice to keep the money is not intelligible to me."

* * * *

" I think the agreement was a good defence in the Court of " Conscience, but if it were otherwise, the recovery there was a breach of " the agreement, upon which an action lay; and this was in my judg- " ment the only remedy. Shall the same judgment create a duty for the " recoveror upon which he may have debt, and a duty against him upon " which an action for money had and received will lie ? This goes " beyond my comprehension. I belicve that judgment did not satisfy " Westminster Hall at the time; I never could subscribe to it; it " seemed to me to unsettle foundations."

These arguments appear to us very strong to shew that a Court which is obliged to decide on part of a case only, and whose decisions must therefore give rise to original suits in other Courts, or else work irremediable injustice, ought not to be tolerated: but they do not seem to

us to prove, that, when such Courts are tolerated, there is any absurdity or inconsistency in having other Courts of original jurisdiction to counteract the mischievous effects of their decisions.

An Appellate Court only interferes where the Court before which the matter was first brought, has fallen into error. A Court of Equity interferes upon a quite different, and in some respects opposite ground. It interferes because the Court before which the matter was first brought, has decided *rightly*, and in so doing has produced a defect of justice. If the Court before which the matter was first brought has not decided rightly, a Court of Equity would tell a party applying to it, that it had no jurisdiction, that his remedy was by application to the Court appointed by the constitution to correct the errors of the one in which he had been litigating. If indeed that was one to which the constitution has intrusted final jurisdiction, or whose jurisdiction had in this instance become final, by the efflux of the time limited for appellate proceedings, then the Court of Equity would be bound to presume that the decision was right, and would be justified in affording its own peculiar relief if the case required it.

These seem to be the principles on which Lord Mansfield proceeded, and that he was right and Chief Justice Eyre wrong (assuming always that an action for money had and received is, *quoad hoc*, a Bill in Equity), we think we can prove by the authority of Lord Eldon.

Looking at the question abstractedly Lord Mansfield thought that the agreement was no defence in the Court of Conscience, as being beyond its jurisdiction. Chief Justice Eyre thought that being a defence against the claim made in the Court of Conscience, the agreement was for that reason, drawn within its jurisdiction.

Upon this we shall only remark in passing that, whichever of these high authorities may be right, their difference furnishes us with an argument in the shape of a dilemma against Courts of Conscience upon the English plan. If Lord Mansfield is right, then such Courts must frequently do injustice in the matters which come before them, from defect of jurisdiction. If Chief Justice Eyre is right, then such Courts must frequently do injustice because they are incompetent in point of knowledge, to decide the questions thus incidentally and against the intention of the Legislature, drawn within their jurisdiction; and so *quâcunque viâ datâ*, Courts of Conscience ought to be superseded by the sort of Courts recommended in the first part of this Report to which neither of these objections is applicable.

We return to the subject under discussion.

Lord Mansfield thought, looking at the question abstractedly, that the agreement was no defence in the Court of Conscience; whether he was right or wrong is immaterial to the present purpose, for he also thought, that, as the Court of Conscience had itself decided that the agreement was no defence because beyond its jurisdiction, and as the Court of Conscience is a Court from which no appeal lies, he was bound to assume the same doctrine for the purposes of this case, whatever might be his opinion of the correctness of that doctrine in the abstract.

In this we can prove by the authority of Lord Eldon, that Lord Mansfield was right. The case of Farquharson *vs.* Pitcher 2 Russell, 81, bears a striking resemblance to that of Moses *vs.* Macfarlan in its circumstances, in the arguments adduced and in the decision; and shews, we think, that Lord Eldon, if he could have been brought to admit that an action for money had and received is for this purpose a Bill in Equity, or, which comes to the same thing, if a Bill in Equity had been filed against Macfarlan, instead of an action for money had and received, would have done exactly what Lord Mansfield did.

It must be remembered that Chief Justice Eyre's objection is that the case of Moses *vs.* Macfarlan violates the principle "that the merits "of a judgment can never be overhaled by an original suit either at "Law or *in Equity*."

The facts of the case of Farquharson *vs.* Pitcher were shortly as follows. The plantiff Farquharson being resident in Martinique had demands on Æneas Barkly in London. To enforce payment his friend W. H. Pitcher suggested that his brother Augustus Pitcher, a Solicitor in London, should be employed, and in order that Augustus Pitcher might exert himself with more zeal, it was arranged that the business should be represented to him as to be done on the account of W. H. Pitcher. Accordingly Farquharson executed a deed by which, for a fictitious consideration, he assigned absolutely to W. H. Pitcher his pecuniary demand on Barkly, and he at the same time executed a Power of Attorney in his favor. The actual agreement, however, between the parties was, that W. H. Pitcher should be merely a trustee for the plaintiff; and in order to shew the true intent of the transaction W. H. Pitcher signed a memorandum, in which he declared that he had no interest in the property assigned, and that the assignment had been executed only to facilitate the recovery of the demand.

Afterwards Farquharson came to London and finding that no steps had been taken against Barkly, he informed Augustus Pitcher that he was the party actually interested and requested him to proceed on his, Farquharson's, account. A suit was instituted, and Barkly by way of compromise, paid the sum of a thousand Guineas. Augustus Pitcher received the money on Farquharson's behalf, and made some payments out of it to him or on his account.

Augustus Pitcher having acted as Farquharson's Solicitor in various other matters, and accounts subsisting between them, brought an action against him. Farquharson obtained from the Court of King's Bench a rule calling on Augustus Pitcher to shew cause why his Bill of Costs should not be taxed, why he should not give credit for all sums of money received by him for or on account of Farquharson, and refund what upon such taxation might appear due from him, &c.

By a subsequent order of the Court of King's Bench the action and the matters of the former rule were referred to the determination of the Master.

In the proceedings before the Master of the King's Bench, Farquharson contended that he ought to have credit for the whole of the £1050 which Augustus Pitcher received from Barkly, and he produced the memorandum to shew that the assignment was merely a conveyance in trust for himself. But the Master decided that the memorandum, not being under seal, did not legally affect or countervail the deed of assignment which was under seal; that therefore he could not take into his consideration its nature, terms or effect; that he could look only at the legal effect of the Deed, under which the sum of £1050 appeared to have become in Law the money of W. H. Pitcher for a valuable consideration; and consequently, that Augustus Pitcher could not be called upon to give credit for that sum to Farquharson, and should be charged with no more in respect of such sum of £1050 than the moiety thereof, with which he had charged himself in certain accounts delivered and insisted upon by him, and which the Master treated as settled accounts. The Master made his *allocatur* upon that principle, and by it he directed Farquharson to pay £233 to Augustus Pitcher.

Although Farquharson had been arrested no bail bond had been given to the Sheriffs, and Pitcher obtained a rule to shew cause why an attachment should not issue against the Sheriffs of Middlesex for the sum mentioned in the Master's *allocatur*.

Farquharson then applied to the Court of King's Bench to review the taxation and *allocatur* on the ground, that Augustus Pitcher had been charged with no more than a moiety of the 1050£, and that the deed of assignment had been treated as a valid deed for *bona fide* consideration: but the Court coincided with the Master's view of the case, and refused to enter into the merits of the memorandum and declaration of trust.

The Bill stated these transactions, and the prayer was that the plaintiff might be declared entitled in Equity to have credit for and to receive the moiety of the 1050£ not already allowed him in account; that a general and equitable account of receipts and payments and taxation of untaxed Bills of Costs might be taken, and had between the plaintiff and Augustus Pitcher, and directions given for the payment of the balance; that Pitcher might be restrained from prosecuting either the action then pending, or any proceeding by way of attachment or process of contempt against the plaintiff, or the Sheriffs, for compelling payment of the sum claimed by him under the *allocatur;* and that the Sheriffs might be restrained from paying the money to Pitcher.

The defendant, Augustus Pitcher, filed a general Demurrer.

The Counsel for the Demurrer argues thus: " The Bill is filed in " respect of matters which not only are the proper subject of legal cogni- " zance, but have actually been determined by a competent Common " Law authority. The first order of the King's Bench called on the " defendant to shew cause why he should not give credit for all sums of " money received by him for or on account of the plaintiff, and refund " what might appear to be due from him; and by the second order, " all the matters of the former order are referred to the determination " of the Master. That Officer has taken the account and made his " determination: his decision was questioned before the Court; and " the Court was of opinion that he had come to a right conclusion. " The Court of King's Bench therefore, has given the plaintiff credit " for all the sums which the defendant received on his account.

" The ground on which the Bill proceeds is, that the defendant " has not been charged with the sum of £1050 received by him in " respect of the claim which had been assigned to his brother, but which " is alledged to have always belonged to the plaintiff. If the fact be so, " the Court of King's Bench and the Master have erred; but that a " Court of Law has erred in a matter submitted to its jurisdiction and " with which it was competent to deal, gives no title to equitable relief."

This we see is precisely the argument of Chief Justice Eyre, with regard to the case of Moses *vs.* Macfarlan. He contended that the Court of Conscience had erred in excluding the agreement from their consideration, and that such error could give no title to the equitable relief sought to be obtained by the action for money had and received in the King's Bench.

The Counsel for the Demurrer then went on to shew upon principle and upon authority, that the Court of King's Bench had erred in excluding the memorandum from their consideration.

Upon principle they contended that—" The assignment could have " no more operation in a Court of Law than the memorandum, a Court " of Law could not pay greater regard to the one than to the other ; " the circumstance that the one was under seal, and that the other was " not under seal was altogether immaterial. There cannot be a legal " assignment of a chose in action in contradistinction to an equitable " assignment. There can be no assignment of a chose in action, " whether under or not under seal, which will enable the Assignee to " sue for it in a Court of Law in his own name, and without the inter- " vention of the Assignor. The effect of an assignment at Law as well " as in Equity, is to operate on the beneficial interests, not on the legal " right. There was nothing therefore to preclude the plaintiff from " having credit for the whole £1050, if he had a just title to it."

" They then cited several authorities to shew that a Court of Law " will take notice of a trust of a chose in action and will consider who " are the persons beneficially interested, and they concluded with the " proposition that 'Equity will not interfere to try again what has been " 'already tried, and to retard the execution of the judgment which has " 'been pronounced.' "

The Counsel in support of the Bill said, *inter alia*, " it was decided " (perhaps properly) that the consideration of Farquharson's right to the " £1050 could not be gone into there (in the King's Bench.) The same " party who prevented a Court of Law from taking cognizance of the " matter, now says, you ought to have enforced your claim at Law, and " are therefore to be shut out from a Court of Equity."

" It is vain to argue that there are authorities, according to which " the Court of King's Bench might have gone into the question which is " raised upon this record. It is sufficient that the Bill alleges, that the " Court of Law did refuse to enter into the consideration of those

" matters which constitute the case entitling us to equitable relief. It " must be assumed upon the present state of the record, that the plaintiff " has not had, has not been able to have, and is not entitled to have any " remedy at Law."

This argument, to which it will be seen Lord Eldon assented, is the same as Lord Mansfield's in the case of Moses *vs.* Macfarlan. His judgment might, without any alteration of the sense, be expressed, *mutatis mutandis*, in the very words just quoted, or in the very words now to be quoted from Lord Eldon's judgment.

" The Demurrer for want of Equity must be overruled, he said, I do " not enter into the discussion of the validity of the several authorities " which have been cited to shew that a Court of Law might have given " effect to the Equity on which the plaintiff relies. This Bill states, that " the Master of the King's Bench refused to try the equitable right. " I therefore look upon the authority of this very case as stated in the " Bill, as an answer for the purposes of this case, to the older authorities " which have been cited."

The Demurrer was of course overruled.

We have never heard that this case has been thought to unsettle foundations, and yet, if the case of Moses *vs.* Macfarlan is to be considered as overhaling the decision of the Court of Conscience, this case must also be considered as overhaling the decision of the Court of King's Bench. The truth seems to be that neither case is open to that imputation, that both are examples of equitable jurisdiction, relieving against the decision of another Court upon grounds which were excluded, and must be taken to have been properly excluded from the consideration of that Court.

The lesson of Jurisprudence to be drawn from this discussion is, that if Lord Mansfield erred in the case of Moses *vs.* Macfarlan, he erred only in holding that an action for money had and received was for the purposes of that case, a Bill in Equity. That once assumed, the rest of his doctrine follows as a matter of course.

The Legislative lesson is, that Courts like the Court of King's Bench, ought to be furnished with the means of doing justice in all cases within their jurisdiction, and that Courts of Conscience, inasmuch as they cannot be furnished with such means without great risk of injustice, ought not to be suffered to exist at all. Both these exigencies are provided for in our scheme.

The case of Bauerman *vs.* Radenius (7 T. R. 663) will supply our next topic. It does not seem clear from the Report of the case on which side the Equity and Good Conscience lay; but assuming for the sake of argument that they were with the plaintiff, against whom the Court decided upon strictly legal principles, then the sort of obstruction to justice which occurred, would be remedied by the simple provision, which seems to us clearly desirable upon more general grounds, of allowing the parties to the cause to be examined *vivâ voce* in the same way as other witnesses. This cannot be done in the English system either by a Court of Law or a Court of Equity. The only way of accomplishing it is the fantastic one of getting a Court of Equity to order a Court of Law to do it. And that such a course as this should seem a wise one to such a man as Lord Kenyon, is one of the most remarkable illustrations of the degree to which a servile and uncritical study of the English system perverts the understandings of those who engage in it. We look upon Lord Kenyon as the most vigorous intellect among the antagonists of Lord Mansfield. He is also the most candid among those antagonists. He does not, like Lord Redesdale, accuse Lord Mansfield of having Scotch prejudices on his mind; but openly avows his own English prejudices as the sources of his reverence for the separate administration of Law and Equity.

The case of Bauerman *vs.* Radenius was an action for delivering goods wet and ill-conditioned.

The principal question at the trial arose on the production by the defendant of a letter from the plaintiffs, who were the shippers of the goods, to Van Dyck and Co., entirely exculpating the defendant from all blame or imputation of negligence or misconduct, and, stating that he acted in every respect according to the plaintiffs' orders by stowing the goods under their direction. But it also appeared in the same letter that Van Dyck and Co. were the persons on whose risk the goods were shipped, that they were the persons really interested in the suit, and had indemnified the plaintiffs, their Agents, in whose name they had brought this action. Whereupon it was contended at the trial, in support of the action, that, as it was disclosed that Van Dyck and Co. were the real plaintiffs, and the nominal plaintiffs only their Agents, the former ought not to be concluded by the admissions of their Agents proved, too, by a letter without the sanction of an oath, and that therefore this evidence ought to be rejected: but Lord Kenyon being of a different opinion, the plaintiffs were nonsuited. A motion was afterwards made to set aside the nonsuit, and Lord Kenyon in the course of his judgment, thus expressed himself.

"I have been in this profession more than forty years and have practised both in Courts of Law and Equity; and if it had fallen to my lot to "form a system of jurisprudence, whether or not I should have thought "it advisable to establish two different Courts with different jurisdictions, "and governed by different rules, it is not necessary to say. But, influenced as I am by certain prejudices that have become inveterate with "those who comply with the systems they found established, I find that "in these Courts proceeding by different rules, a certain combined "system of jurisprudence has been framed most beneficial to the people "of this country; and which I hope I may be indulged in supposing, has "never yet been equalled in any other country on earth. Our Courts "of Law only consider legal rights: our Courts of Equity have other "rules, by which they sometimes supersede those legal rules, and in so "doing they act most beneficially for the subject. We all know that if "the Courts of Law were to take into their consideration all the jurisdiction "belonging to Courts of Equity, many bad consequences would ensue."

Lord Kenyon then illustrates his opinion by the case of an action for a legacy. We omit the illustration here because we shall soon have another occasion to quote it. Afterwards he proceeds as follows:

"I exemplify the propriety of keeping the jurisdictions and rules "distinct by one out of a multitude of cases that might be adduced. If "the parties in this case had gone into Equity, and that Court had "directed an issue to be tried, they might have modified it in any way "they thought proper. One of the rules of a Court of Equity is, that "they cannot decree against the oath of the party himself on the "evidence of one witness alone without other circumstances: but when "the point is doubtful, they send it to be tried at Law, directing that "the answer of the party shall be read on the trial; so they may order "that a party shall not set up a legal term on the trial, or that the "plaintiff himself should be examined; and when the issue comes from a "Court of Equity, with any of these directions, the Courts of Law "comply with the terms on which it is so directed to be tried. By "these means the ends of justice are attained, without making any of "the stubborn rules of Law stoop to what is supposed to be the substantial justice of each particular case; and it is wiser so to act than to "leave it to the Judges of the Law to relax from those certain and "established rules by which they are sworn to decide. If the question "that has been made in this case had arisen before Sir M. Hale, or "Lords Holt or Hardwicke, I believe it never would have occurred to "them sitting in a Court of Law, that they could have gone out of the "Record, and considered third persons as parties in the cause."

After some remarks on the circumstances of the case, Lord Kenyon concludes his judgment in the following words: " It is my wish and my " comfort to stand *super vias antiquas:* I cannot legislate, but by my " industry I can discover what my predecessors have done, and I will " servilely tread in their footsteps. I am therefore clearly of opinion on " principles of Law that the plaintiffs cannot recover in this action, and " we cannot in this case assume the jurisdiction of a Court of Equity in " order to overrule the rigid rules of Law."

There is something bordering on the ludicrous in this statement by Lord Kenyon of the origin of his opinion and of the length of time he had held it, as if forty years uninterrupted enjoyment of a prejudice could turn it, by a kind of intellectual prescription, into a sound doctrine. It has, however, the merit of great candour and seems almost to amount to an avowal that, if instead of a judicial decision on what the Law was, he had been called upon as a Legislator for a recommendation as to what it ought to be, he would have felt it his duty to shake off an opinion which he cherished principally on account of its inveteracy. We do not mean to say that all Lord Kenyon's expressions imply an attention to this distinction, on the contrary in the course of his judgment his mind appears to vacillate. Sometimes he seems to be simply declaring the Law avoiding any estimate of its merit or demerit, sometimes to be expressing strong approbation of the Law, sometimes to be admitting that nothing can be said in favor of it by an unprejudiced person.

This apparent vacillation imposes considerable difficulty upon those who undertake to criticize him.

That a Judge should not legislate but should discover what his predecessors have done and tread servilely in their footsteps, is a doctrine which we have no disposition to combat, at least so long as there is a Legislature ready to amend the defects of the Law. But when Lord Kenyon says " by these means (the trying actions or issues under the " directions of a Court of Equity) the ends of justice are attained without " making any of the stubborn rules of Law stoop to what is supposed to " be the substantial justice of each particular case, and it is wiser so to " act, than to leave it to the Judges of the Law to relax from those " certain and established rules by which they are sworn to decide," it is not very easy to understand whether he speaks with reference to the wisdom of a Judge or to the wisdom of a Legislator.

If he means only that the Judges ought to decide as they are sworn to do; and that they are sworn to decide according to certain established

rules of evidence; these are propositions which we are not called upon to dispute. We may remark, however, that the latter is scarcely a true proposition. It is scarcely true, seeing that the rules of evidence have almost all been made by the Judges and from time to time altered by them, to say that they are sworn to decide by those rules as they exist at any given time.

But by the expression "it is wiser so to act than *to leave it to the* "*Judges of the Law* to relax from those certain and established rules by "which they are sworn to decide," Lord Kenyon seems to mean that it is wiser in the Legislature so to act. Yet if we so understand him the whole sentence will yield no consistent meaning. For admitting that the Judges of the Law are sworn to decide on such subjects according to established rules, still they are only sworn to decide according to such rules as are from time to time established by the Legislature.

Upon the whole it may be said, that Lord Kenyon's judgment contains no argument which can help to decide the Legislative question arising out of this case.

That Legislative question does not exactly correspond with the Judicial question presented for the decision of the Court.

For it ought to be observed, that this case of Bauerman *vs.* Radenius differs from the generality of the cases, in which Courts of Law have been asked to relax the rigour of their rules. The real plaintiff against whom those rules operated, did not ask the Court to do what good conscience required, or what a Court of Equity would have directed. He did not ask the Court to examine the nominal plaintiff as a witness, but to exclude altogether the admission made by the nominal plaintiff in favor of the defendant, which would clearly be going beyond what good conscience requires; but which is a proceeding much more analogous to the practice of Courts of English Law. We admit therefore, not only that Lord Kenyon decided according to Law, but also that for any thing that appears to the contrary, he adopted the most equitable of the only two courses presented to him.

But in delivering his judgment, so far as he considers the matter in a Legislative point of view, he discusses it without reference to this circumstance. He discusses the matter as if the case had stood thus—

A man has a good cause of action in the name of a third person in a Court of Law, according to the English system. The general rule is, that the plaintiff in an action at Law cannot be examined. But there

are acknowledged exceptions to the rule. The party aggrieved in the supposed case alleges that it is within the exception, and the question for a Legislator is, shall such a party be allowed to prove to the Court within whose cognizance the subject matter lies, that the case is within the exception, and that the nominal plaintiff ought accordingly to be admitted to give evidence; or shall he be compelled to bring a distinct suit in a distinct Court for the purpose of adducing this proof, and getting an order to have the nominal plaintiff admitted as a witness in the Court which is to try the cause.

Lord Kenyon's judgment, as we have already remarked, contains no argument in favour of the side of this question to which he appears to lean, and argument appears to us to be superfluous on the other side.

Our opinion and our recommendation go a great deal farther, for we hold that every Court should have the power to examine the real plaintiff and defendant, and of course *a fortiori* every Court should have the power to examine a person who is placed in that situation, not on account of his interest in the subject matter, but on account of some real or supposed convenience of form.

In treating the last topic we purposely omitted Lord Kenyon's illustration drawn from the effects of suing at Law for a legacy, in order that we might introduce it in the separate discussion of that subject on which we are now about to enter. This was Lord Kenyon's favorite instance of the danger of confounding legal and equitable jurisdiction. He refers to it as the most palpable illustration of that doctrine. He refused in the case of Deeks *vs.* Strutt (5 T. R. 690,) to exercise that jurisdiction in a Court of Law, stopping the Counsel who was to have argued against the jurisdiction, and overruling Lord Mansfield's doctrine on the subject, and he congratulates himself on having made an impression upon Mr. Justice Buller by his arguments. Yet when the doctrine which he maintained on the subject is considered attentively, it will be found, singularly enough, to be quite unanalogous to the system which Lord Kenyon so much admired. It has moreover been since overruled by his successor Lord Ellenborough in the case of Doe dem. Lord Saye and Sele *vs.* Guy, (3 East's R. 120,) for although one of the Judges in that case endeavors so far to explain away Lord Kenyon's doctrine as to make it not inconsistent with Lord Ellenborough's decision, the attempt is eminently unsuccessful. We now proceed to prove all this.

In the case of Bauerman *vs.* Radenius, Lord Kenyon says—"To "mention only the single instance of legacies being left to women who "may have married inadvertently, if a Court of Law could entertain "an action for a legacy the husband would recover it, and the wife "might be left destitute: but if it be necessary in such a case to go "into Equity, that Court will not suffer the husband alone to reap the "fruits of the legacy given to the wife; for one of its rules is, that he "who asks Equity must do Equity, and in such a case they will "compel the husband to make a provision for the wife before they will "suffer him to get the money." 7 T. R. 667.

In another case, The Mayor of Southampton *vs.* Graves, he again illustrates the danger of confounding Law and Equity by the same instance of an action for a legacy—"A similar mistake was, I think, "made, he says, in this Court, a few years before I sat here, on "another question, where it was decided, that an action at Law "might be maintained for a legacy partly on the ground, that the "plaintiff would have recovered it as of course in a Court of Equity, "on its being mentioned to me by the late Mr. Justice Buller, I took "the liberty of asking him whether or not he was sure that the "Court had taken a view of the whole question before they had decided "it, reminding him, that it is a constant rule in Courts of Equity, "when the husband files a Bill for a legacy given to the wife, that (if "I may use the expression) they stop it *in transitu*, if there be no "provision for the wife; whereas, if a legacy could be recovered in an "action at Law, there would be no provision for the wife and family, as "the husband would at once take the legacy; that learned Judge, whose "legal knowledge was universally allowed, immediately admitted the "force of the observation. There was indeed a case in Cromwell's time, "in which an action at Law for a legacy was maintained, but the reason "given for that decision was, that there would be a failure of justice if "Courts of Law did not take cognizance of the question, the Spiritual "Courts not being then open: but as soon as those Courts resumed their "functions, suits of the kind returned into their proper channel; and "since I have sat in this place, it has been determined that a legacy "cannot be recovered in a Court of Law." 8 T. R. 593.

The case to which Lord Kenyon alludes in the last sentence is, that of Deeks *vs.* Strutt. 5 T. R. 690. His judgment in that case is as follows: "The supporting of the present action would be attended with "the most pernicious consequences; and I believe that no action till "lately (except one in the time of the Commonwealth) for a legacy has "been supported in a Court of Law. The arguments which have of

" late years been advanced in support of this action, are founded on the " supposed justice of the case and the convenience of the parties: but " when it is considered in what manner a Court of Equity interposes in " suits for legacies, in taking care that provision is made for the different " parties entitled, and what inconvenience and even ruin to private " families would have ensued from determining that an action can be " brought in a Court of Law for a legacy, I think, that those who have " wished to support the action in a Common Law Court would hesitate " before they came to the conclusion, that the action can be maintained. " If an action will lie for a legacy, no terms can be imposed on the party " who is entitled to recover; and therefore, when the legacy is given to a " wife, the husband would recover at Law, and no provision could be " made for the wife or family: whereas, a Court of Equity will take care " to make some provision for the wife in such a case. But the whole of " this admirable system, which has been founded in a Court of Equity, " will fall to the ground if a Court of Law can enforce the payment of " a legacy. I mention these as decisive reasons in my mind against " the jurisdiction of the Courts of Law over this subject; and I know " they have influenced those who once entertained an idea that this " action could be supported. The only case that I know of where it was " said that this action might be maintained, happened in the time of the " Commonwealth; but the reason then given was to prevent a failure of " justice, the Ecclesiastical Courts being at that time abolished, and the " Court of Chancery not having then, nor indeed until the time of Lord " C. Nottingham, entertained any jurisdiction over the question of " legacies. Therefore as the arguments of convenience and justice, on " which alone it has been thought that this action is maintainable at Law, " bear strongly against it; and as I find only one case in which it has " been supported, and which was decided contrary to all precedent, " merely because then the party had no other remedy, I am clearly of " opinion that the present action cannot be maintained."

Now this denial of jurisdiction over legacies to Courts of Law, whatever may be its merit with reference to convenience and utility, is certainly not recommended by any conformity to the English system in general. The mode in which the mischiefs produced by the defective constitution of Common Law Courts, is remedied in the English system is not by taking away from them jurisdiction which they may exercise mischievously, but by preventing the suitor from applying to them or from taking advantage of their decisions, that is to say by Injunction from a Court of Equity.

In all the other cases we have examined, the complaint against the Courts of Law has been that they have undertaken to do complete justice

or to abstain from doing injustice, thus usurping the functions of Equity; but here the complaint is that they do incomplete justice or positive injustice, that they do something which requires to be set right in Equity, which is just what in other cases they are applauded for doing by the admirers of the English system. If, indeed, they had not only exercised jurisdiction in cases of legacies, but had also undertaken to make a husband provide for his wife out of the legacy due to her for which he sues, or had undertaken (as Lord Mansfield seems to have intended) to make the legatee give security to refund upon a deficiency of assets, a case of usurpation on the Courts of Equity would be made out. But as long as they confine themselves to adjudging the legacy to the legatee, leaving it to the Court of Chancery to interfere by injunction in the case of a husband suing for his wife's legacy, and to make the legatee refund in case the assets are insufficient to pay creditors, they seem only to be acting the part usually assigned to them in that combined system of jurisprudence which, as Lord Kenyon thought, has never yet been equalled in any other country on earth.

Lord Kenyon therefore in finding fault with the exercise by Courts of Law of this jurisdiction, appears to be arguing against his own general doctrines and in favour of ours.

Lord Kenyon is here a witness against himself and in favour of us. A tribunal with the limited powers of a Court of Law cannot do complete justice in the case of a legacy; therefore, according to Lord Kenyon, it has no jurisdiction or ought to have no jurisdiction over legacies. To this doctrine we entirely assent, only we do not stop there. We push this doctrine to the whole extent of its logical consequences, and hold that, as in all suits within its jurisdiction, a Court of Law may, from want of adequate powers, find itself compelled to do incomplete justice, or positive injustice, the whole jurisdiction of such Courts ought to be taken away, or in other words, that there ought to be no such Courts. And if Lord Kenyon had in the case of Bauerman *v.s.* Radenius, applied to the matter then in judgment the principles derived from his illustration, he would have found himself driven to the same conclusion. If, instead of contending that a party in a suit at Law fearing to be defeated by an admission made by the nominal plaintiff, ought to go into Equity to get that impediment removed, he had contended that Courts of Law ought not to exercise jurisdiction over any subject in which they might find themselves compelled to do injustice; but ought to leave all such subjects wholly to Courts of Equity; he would have in effect argued, just as we argue, that there ought to be no Courts of Law which are not also Courts of Equity.

The doctrine therefore of his illustration in the case of Bauerman *vs.* Radenius, of his illustration in the case of the Mayor of Southampton *vs.* Graves, and of his main argument in the case of Deeks *vs.* Strutt, though it appears to us to be excellent doctrine for the guidance of a Legislator, sounds strangely in the mouth of an English Lawyer professing his devotion to English principles; and accordingly the whole doctrine considered as a doctrine of English Law, has been swept away by the subsequent case of Doe dem. Lord Saye and Sele *vs.* Guy 3 East's Reports 120.

This last case is, indeed, distinguishable from that of Deeks *vs.* Strutt, because it was an action to recover a specific chattel against an Executor, who had assented to the bequest; whereas in the former case the annuity which was the subject of the action, was payable out of the general funds of the Testator. The former case therefore is not overruled by the latter, but the principle on which Lord Kenyon decided the former case, is completely overruled.

The Counsel who argued for setting aside the verdict and entering a nonsuit "relied on the ground of the decision in Deeks *vs.* Strutt, which "applied as well to the case of a specific legacy as of a legacy payable "out of the general fund; namely, that no action at Law lay to recover "it against the Executor because a Court of Law could not in many "instances do that justice to the parties concerned, as a Court of Equity "were accustomed to do: for the latter would in the case of a legacy to "a married woman oblige the husband to make a suitable provision for "her, if she were not before sufficiently secured. Whereas this Court "could not impose terms on one who was entitled to recover upon his "legal title. The opinion of the Judges in that case was delivered "generally against supporting an action at Law for a legacy without the "distinction now set up. The cases of Atkins *vs.* Hill and Hawkes *vs.* "Saunders were indeed cases of express promises; but the reasoning "there went the whole length of this case, if it had been well founded: "but it was controverted and considered to be overruled in Deeks *vs.* "Strutt."

This argument of the Counsel for the defendant is absolutely conclusive and unanswerable unless Lord Kenyon's doctrine is abandoned; and the Courts of Law would thus have been deprived of a jurisdiction which unquestionably belonged to them. The Court however thought fit to preserve their jurisdiction and to abandon Lord Kenyon's doctrine. They did it as tenderly as possible.

Lord Ellenborough says "General language used by the Court in "giving their opinions in any case must always be understood with "reference to the subject matter then before them."

This undoubtedly is a sound principle of interpretation, but unfortunately Lord Kenyon's doctrine is not capable of being so restricted. Every word that he said against maintaining an action at Law for legacies, though we should restrict it to actions for legacies payable out of the general fund, will remain equally applicable in its own nature to actions for specific legacies; and if he had in express terms so restricted his own expressions, he would have done neither more nor less than refute his own argument by refusing to admit its logical consequences.

Lord Ellenborough, having thus quietly put on one side the doctrine on the excogitation of which Lord Kenyon had so prided himself, proceeds to shew what, upon English principles, is the proper business of a Court of Law, and what of a Court of Equity in regard to the subject matter. "It never could be doubted, he says, but that at Law "the interest in any specific thing bequeathed, vests in the legatee upon "the assent of the Executor. If it should afterwards appear that there "is a deficiency of assets to pay creditors, the Court of Chancery will "interfere and make the legatee refund in the proportion required."

Le Blanc J. said—"It is admitted that, upon the old authorities, "there is no doubt of the plaintiffs' right to recover unless they have "been overruled by the case of Deeks *vs.* Strutt. But that never could "have been in the contemplation of the Judges there, because it formed "a ground of objection with them to the action that it was a "novel attempt to contend that the Law would raise an implied "assumpsit against an Executor merely from the possession of assets. "They thought that it would not: and in discussing that point, they "shewed the inconvenience which would result from extending the Law "in that respect further than it had been carried before."

This is a very correct account of what the Court *ought to have done* in the case of Deeks *vs.* Strutt; but far enough from a correct account of what *they actually did.* Mr. J. Grose, indeed, who sat in the Court when both cases were decided, did take this line, and was perfectly consistent with himself in both decisions. His judgment in the latter case is as follows:

"The only question in the case of Deeks *vs.* Strutt was, whether "the Law would raise an implied assumpsit to pay the annuity, upon

" proof of the Executor's acknowledgment of assets. I thought it " would not," and it is quite true that this was the only question in the case, but the Chief Justice (and Mr. J. Ashurst supported him) chose to decide this question upon the broad ground, that a Court of Law is incapable of doing justice in an Action for a legacy. They did not " point out," as Le Blanc J. says—" the inconvenience which would " result from extending the Law in that respect further than it had been " carried before," but vehemently contended against the supposed Law being endured to any extent at all. " The whole of this admirable " system which has been founded in a Court of Equity, will fall to the " ground, if a Court of Law can enforce the payment of a legacy." These, as has already been seen, are Lord Kenyon's words, and Mr. J. Ashurst's are not less strong. " Innumerable instances, he says, have " occurred in which the interposition of that Court (a Court of Equity) " has proved highly beneficial to private families, by compelling the " husband to make an adequate settlement on the wife: but if we were " now to determine that an Action could be maintained for a legacy, " wives and families in many instances, would be left destitute of any " provision."

That Lord Kenyon himself would have repudiated Mr. Justice Le Blanc's explanation and restriction of his doctrine, is placed beyond all doubt by the citation we have made from the case of the Mayor of Southampton *vs.* Graves, where after re-stating in all its breadth the doctrine he had laid down in the case of Deeks *vs.* Strutt, he shews with evident satisfaction, the unlimited conclusion to which that doctrine had led " since I have sat in this place, it has been determined that *a legacy* " *cannot be recovered in a Court of Law.*"

This objection to Courts of Law exercising jurisdiction over legacies because (to use Lord Kenyon's words) " ruin to private families would " have ensued," or because (to use Mr. J. Ashurst's words) " wives and " families in many instances would be left destitute of any provision," is so thoroughly un-English, that even if it had not been overturned by the case of Doe dem. Lord Saye and Sele *vs.* Guy, it would have been easy to shew its heterogeneousness by comparing it with other parts of the English system. A Spiritual Court has no more power than a Court of Law to compel the husband to make a provision for his wife out of a legacy bequeathed to her, yet we never heard it contended that a Spiritual Court has no jurisdiction in cases of legacy. Ruin and destitution, indeed, might follow from the exercise of this jurisdiction, but they are to be prevented or remedied in the approved method, by a Chancery Suit.

"The Court of Chancery will, on a Bill filed, grant an injunction "to the Spiritual Court, to stay the husband's proceedings in that Court "to obtain a legacy given to his wife; because that Court cannot compel "the husband to make an adequate provision or settlement on his wife, "as the Court of Chancery will oblige him to do, before it will permit "him to receive the legacy." Maddock's Chancery, vol. I, 129, and see the cases their cited.

With respect to our new Court, its jurisdiction over legacies will of course be limited for the present (as its jurisdiction is on other subjects) to that now exercised by Courts of Law, but wherever it does exercise jurisdiction, it will exercise all the powers necessary for complete justice.

This examination of the objection which has been made to the jurisdiction of a Court of Law over legacies, affords perhaps the true explanation of Mr. Justice Buller's recantation. His object and that of Lord Mansfield was to save parties the expense and delay of going into Equity to obtain complete justice, wherever the powers of a Court of Law could be made to accomplish that purpose. He seems to have been satisfied by Lord Kenyon's argument that this could not be done in the case of a legacy, and therefore yielded upon that point. He yielded, not because he admired that combined system of jurisprudence which Lord Kenyon thought had never been equalled, but precisely because he did not admire it. The moment it was pointed out to him, he felt all the force of the objection, that a Court of Law by undertaking to decide upon claims to legacies, would frequently do that which the parties would be driven into Equity to remedy. There is no evidence, as far as we know, that his recantation went beyond the cases in which this sort of inconvenience would have arisen. The only specific instance of his recantation is this instance of an action for a legacy. It is true, that in the case of Farquharson *vs.* Pitcher, which we have discussed above, Lord Eldon says—"With respect to the "Common Law Authorities which have been cited, I may observe, that "when I had the honor to sit on the same Bench with Mr. Justice Buller, "I had a great deal of conversation with him in respect to the equitable "doctrines of the Court of King's Bench; and though he at an earlier "period of his life, had had some share in introducing Equity into Law, "yet I have his own authority for stating, that he was convinced latterly, "that he had been exceedingly mistaken in his notions of the equitable "jurisdiction of the Courts of Law." Russell's Chancery Reports, II. 86.

These are very large expressions, but in order to judge how far they accurately represent the change in Mr. Justice Buller's mind, it is fit

to advert to what Lord Eldon says in the case of Evans *vs.* Bicknell, when he is protesting against the equitable doctrines of the Court of King's Bench.

" With regard (he says) to the second proposition of Mr. Justice " Buller, that if this (the rule regarding mortgages) had become a rule " of property in Equity, therefore it ought to be adopted in a Court of " Law, with great deference to the learning and memory of that Judge, " that appears to me a very hasty proposition." He then proceeds to argue against the proposition, but makes not the slightest allusion to Mr. Justice Buller's recantation.

A little further on, he says—" It seems to me rather surprising, if " I may presume to say so, that Lord Mansfield, who concurred with " Mr. Justice Buller in a great many of these equitable principles in a " Court of Law, should not have attended to these distinctions; which " perhaps will be found in the very principles on which this Court " exists." 6 Ves. 183. And again he goes on to illustrate what he has been saying, but still without any allusion to the recantation.

Now, Lord Eldon gave his judgment in the case of Evans *vs.* Bicknell in the summer of 1801, very little more than a year after Mr. Justice Buller's death, and when the abovementioned conversations in respect to the equitable doctrines of the Court of King's Bench, must have been quite fresh in his memory. For these conversations must all have taken place between the summer of 1799, when Lord Eldon was appointed Chief Justice of the Common Pleas, and the Easter vacation of 1800, when Mr. Justice Buller died. And these things being so, it is a moral impossibility, that, if Mr. Justice Buller's recantation of his equitable doctrines had been general, or had been large enough to be available for Lord Eldon's purpose, he should have omitted to take advantage of it. Surely, instead of saying " with great deference to the " learning and memory of that Judge," the proposition which he laid down, " appears to me a very hasty proposition;" Lord Eldon would have said (if he could have said so with truth) " It not only appears " to me a very hasty proposition, but I have Mr. Justice Buller's own " authority for stating, that he himself was latterly convinced it was so."

And again, instead of saying—" It seems to me rather surprising, " if I may presume to say so, that Lord Mansfield, who concurred with " Mr. Justice Buller, in a great many of these equitable principles in a " Court of Law, should not have attended to these distinctions;" Lord Eldon would have declared (if he could have done so with truth) that

there could be no great presumption in expressing surprise that Lord Mansfield should have concurred with Mr. Justice Buller, in neglecting the distinctions between Courts of Law and Courts of Equity, seeing that Mr. Justice Buller was latterly himself convinced that he had been exceedingly mistaken in adopting that course.

Lord Eldon gave his judgment in the case of Farquharson *vs.* Pitcher in the year 1826, when more than a quarter of a century had elapsed from the date of his conversations with Mr. Justice Buller on Law and Equity; and we think it is sufficiently evident, from what has been said, that he could not then have had an accurate recollection of the extent to which Mr. Justice Buller acknowledged he had been mistaken.

To what extent he did make that acknowledgment, may, we think, be inferred from the specific instance of an action for a legacy, which instance was given by Lord Kenyon in the summer of 1800, immediately after Mr. Justice Buller's death, and without any intimation that Lord Kenyon had understood him to have abandoned generally the principles on which he and Lord Mansfield had so long acted.

If this be so, Mr. Justice Buller is an authority in our favour, not only when he endeavoured to extend the powers of Courts of Law, so as to enable them to do complete justice in the cases coming before them, but also when, yielding to Lord Kenyon's arguments, he repented of having endeavoured to extend their jurisdiction over cases in which, by the defect of their constitution, they cannot do complete justice. His recantation thus explained, is a most important authority in favour of the proposition, that no Court should be suffered to meddle with subjects in which its meddling may produce mischiefs which another Court must be called in to remedy.

The last example we shall give of the attempts of Lord Mansfield and Mr. Justice Buller to introduce Equity into suits at Law is their doctrine respecting the setting up of outstanding terms to defeat the lessor of the plaintiff in Ejectment. Lord Eldon is here the great antagonist. The case which seems principally to have provoked his indignation is not one in which the Court refused to allow an outstanding term to be set up; but one in which the Court did allow the term to be set up, because the circumstances were such that a Court of Equity would have allowed it.

In the case of Goodtitle *vs.* Morgan (1. Term Reports 762,) Mr. Justice Buller is reported to have expressed himself thus—

"It is an established rule in a Court of Equity, that a second "mortgagee, who has the Title Deeds without notice of any prior "incumbrance, shall be preferred; because if a mortgagee lends money "upon mortgage without taking the Title Deeds, he enables the "mortgagor to commit a fraud. If this has become a rule of property "in a Court of Equity, it ought to be adopted in a Court of Law. "Here the defendant took mortgages without inquiring after the Title "Deeds: the subsequent mortgagee is a purchaser without notice; and "as he has taken the Title Deeds, he has the better Title."

It appears that according to cases in Equity decided after the case at Law from which we have been quoting, the rule of Equity is not now as stated by Mr. Justice Buller. "The doctrine at last is (so Lord Eldon "says in the case of Evans *vs.* Bicknell 6. Ves. 174), that the mere circum-"stance of parting with the Title Deeds, unless there is fraud, conceal-"ment, or some such purpose, or some concurrence in such purpose, or "that gross negligence that amounts to evidence of a fraudulent intention, "is not of itself a sufficient ground to postpone the first mortgagee."

Lord Eldon admits however that Mr. Justice Buller had sufficient grounds for supposing the rule to be as he stated it, and admits also that if the cases of joint tenants, &c., in which, from the nature of the Title, the Deeds may be honestly out of the possession of the first mortgagee, are excepted, such a rule would avoid a great deal of fraud in mortgage Titles.

But it is with Mr. J. Buller's second proposition that we are concerned, and it is against that Lord Eldon directs his attack.

"With regard to the second proposition of Mr. J. Buller, that if "this had become a rule of property in Equity, therefore it ought to be "adopted in a Court of Law, with great deference to the learning and "memory of that Judge that appears to me a very hasty proposition; "and the converse undoubtedly will not hold; for it is impossible for "this Court upon the principles, upon which it acts, to say that what-"ever is a rule of proceeding at Law is of course a rule of proceeding "in Equity. It may be asserted that it should be the case: but it is "impossible it can. For instance: in the case of the mortgagee, put in "Pasley *vs.* Freeman, if the man makes a false declaration and an "action can be maintained upon that, and the principle upon which it

" can be maintained is, that a Court of Equity will relieve, the converse " ought to hold; that where an action can be maintained, Equity should " give relief. But is that so? a defendant in this Court has the protec- " tion arising from his own conscience in a degree in which the Law " does not affect to give him protection. If he positively, plainly and " precisely, denies the assertion, and one witness only proves it as " positively, clearly and precisely as it is denied, and there is no circum- " stance attaching credit to the assertion overbalancing the credit due " to the denial as a positive denial, a Court of Equity will not act upon " the testimony of that witness. Not so at Law. There the defendant " is not heard—one witness proves the case; and however strongly the " defendant may be inclined to deny it upon oath, there must be a " recovery against him.

" It seems to me rather surprising that Lord Mansfield, who " concurred with Mr. J. Buller in a great many of these equitable prin- " ciples in a Court of Law, should not have attended to these distinctions, " which perhaps will be found in the very principles upon which this " Court exists."

The objection here made by Lord Eldon to the attempts of Courts of Law to assume equitable jurisdiction is, we see, that the latter cannot possibly administer the same kind of justice as the former, because in a Court of Law the defendant has not the protection arising from his own conscience. As soon as it is enacted that a defendant shall have this benefit in a Court of Law, Lord Eldon's objection vanishes. But our proposed Act does better than this. The principles involved in Lord Eldon's objection have been themselves objected to, and with great reason; and our Act gives to the new Court the power to examine the defendant and to weigh his testimony in a manner which obviates all objections.

We now resume our quotation from Lord Eldon which we have interrupted for the sake of making this remark. He proceeds to apply what he has been saying to the case of a second mortgagee.

He first alludes to the doctrine of the Court of King's Bench as to satisfied terms, he shews the danger which he apprehended would result, and points out that Courts of Law could not guard against that danger in the same way that Courts of Equity can, for want of power to examine the defendant.

" Titles to property may possibly be found to be very considerably " shaken by the doctrine of the Court of King's Bench as to satified

" terms. The Law as to that here is, that a mortgagee having no notice " of the first mortgage, if he can get in a satisfied term, would do that " which is the true ground of the decision, though it is not put upon " that by Mr. Justice Buller; he would, as in conscience he might, get " the legal estate; and by virtue of that protect his estate against the " first mortgagee, having got a prior title, the conscience being equal " between the parties. When once it is said at Law, that a satisfied " term should not be set up in an ejectment, the whole security of that " title is destroyed; and therefore even with the modern correction which " that doctrine has received in the late cases, which is, that you may set " up the term though satisfied, and put it as a question to the jury " whether an assignment is to be presumed, it seems to me very danger- " ous between purchasers: and the leaning of the Court ought to be " that it was not assigned; and I fully concur with Lord Kenyon that " it is not fit for a Judge to tell a jury, they are to presume a term " assigned, because it is satisfied: but there ought to be some dealing " upon it: or you take from a purchaser the effect of his diligence in " having got in the legal estate; to the benefit of which he is entitled. " Then, suppose, the law takes upon itself to decide the question between " purchasers upon this subject, can it decide upon the same rules as " Courts of Equity, as upon the question of notice? It will be said upon " this doctrine, a Court of Equity does inquire into this; and it is a rule " of property in Equity; and therefore ought to be a rule of property at " Law. But how has it become a rule of property in Equity? In " Equity the first mortgagee may ask the second whether he had notice. " If that defendant positively denies notice, and one witness is only " produced to the fact of notice, if the denial is as positive as the asser- " tion, and there is nothing more in the case, a Court of Equity will not " take the benefit of the term from the second mortgagee; placing as " much reliance on the conscience of the defendant as on the testimony " of a single witness, without some circumstance attaching a superior " degree of credit to the latter. It is impossible therefore that the rule " of property can be said to be the same as at Law; and if it stands " upon different principles, in fact it is perfectly different."

Be it so: but if you give to a Court of Law the power of examining the defendant the whole impossibility vanishes. We entirely concur with Lord Eldon that the want of power to examine the defendant is a great defect in the Courts of Common Law, and prevents them from being fit instruments for doing complete justice in all cases. But we cannot go along with him in thinking, as he apparently did, that as much reliance ought to be placed upon the conscience of a party to the suit answering in writing written questions, with his Attorney and Counsel instructing

him how far he may go towards deceiving the Court, without laying himself open to an indictment for perjury, as upon the oral testimony of a disinterested witness.

" This rule," says the learned Reporter, Mr. Vesey, " considered " simply as a general rule of evidence, seems open to observation, 1st, as " prefering the evidence of a party; 2ndly, upon the obvious defect of " written compared with oral testimony. It is difficult to determine the " balance of inconvenience and danger on the one hand, from permitting " in a commercial country the defendant to avail himself of his own oath " to a degree in some respects beyond the old wager of Law; and on the " other, from deciding upon the evidence of a single witness in cases even " requiring the utmost accuracy and precision in the proof."

It is no doubt difficult to determine this balance of inconvenience and danger; but it is a difficulty of which the solution ought to be a mere matter of curiosity as there is not the least necessity for running into either extreme. Only let the Legislature say to the Judge " examine the parties *vivâ voce* and the one witness, when there happens " to be only one; decide what weight is due to the oath, or rather to the " testimony of the defendant, as well as to that of the single witness, not " by any pre-established standard, but according to the sage advice of the " Emperor Adrian, '*ex sententia animi tui:*'" only let the Legislature say this, and the difficulty in question becomes of no more practical importance than those which exercised the ingenuity of the schoolmen.

We must now say a few words upon the nature of that protection to purchasers which Lord Eldon accuses the Court of King's Bench of destroying by its refusal to allow the lessor of the plaintiff in Ejectment to be defeated by an outstanding satisfied term. Our own opinion on this subject coincides entirely with that expressed by the Commissioners for inquiring into the Law of real property, in their second Report, pp. 10, *et seq.*

After shewing that the getting in an outstanding term causes expense, delay and difficulties, that the protection thus obtained is for various reasons, precarious and inadequate, that although the term may protect the purchaser against secret incumbrances, it may yet not give him a marketable title, that the system of protection by terms is a source of danger to purchasers, and a cause of mischief which otherwise would not exist, the Commissioners conclude thus—" If the system " of protection by the assignment of terms could be made available in " every title, and were not productive of the other evils adverted to, it

" would still be open to the objection, that it is liable to work injustice; " for whenever it comes into operation its effect is simply to transfer the " injurious consequences of fraud from one innocent party to another, and " generally to postpone or exclude a person who had by priority in point " of time the best equitable claim.

" By this artificial system legal rights are made to depend on " matters foreign to the merits of the case, suits are occasioned by it, " in which the question is not between the rightful and the wrongful " party but between two having equal merits ; the point to be determin- " ed being which party shall be the victim of the fraud of a third party " or of mere misfortune, and the result of which suit depends on a sort " of chance. To obtain the accidental advantage of the " *Tabula in* " *naufragio*" (as it is called) very objectionable proceedings may be " resorted to, which the Law is forced to countenance, as where a man " by climbing into an open window, to which he had no lawful access, " obtained a deed, the possession of which entitled him to the benefit of " the legal Estate.

" The system has a tendency in some cases to promote fraud ; it may " enable a party who has made a settlement or mortgage to defeat it with " greater facility ; it appears too that in some instances it induces a " system of selfish caution, with an indifference to the just claims of other " persons, since some respectable practitioners have avowed, that when an " outstanding term can be obtained, they advise their clients to omit the " usual inquiries, by which the existence of intermediate incumbrances " might be discovered, and to rely upon the legal estate to defeat them."

After this it will perhaps not be thought that the destruction of the system of protection by outstanding terms, would have been an evil so great as to outweigh the general beneficial effects of Lord Mansfield's refusal to permit an equitable title to be defeated by them in Ejectment. But it is not quite clear to us that Lord Mansfield intended to carry his doctrine to the length of destroying that sort of protection, such as it is, which purchasers may derive from outstanding terms. We do not doubt that Lord Mansfield thought, as the real property Commissioners think, that the sort of protection in question is open to objection because " its effect is simply to transfer the injurious con- " sequences of fraud from one innocent party to another, and generally " to postpone or exclude a person who had by priority in point of time, " the best equitable claim." We are quite sure that he must have thought that unlawfully climbing into an open window, is not a sort of diligence which the Law ought to reward, and it is therefore not

impossible that he wished to go the whole length imputed to him in his career of judicial legislation, that he wished to prevent the setting up of an outstanding term in Ejectment as well when the object of setting it up is to take away the fair advantage which one equitable title ought to have over another by priority in point of time, as when the object of setting it up is to defeat an equitable title.

It rather appears to us however (but upon such a matter we wish to speak with great diffidence) that Lord Mansfield meant to do no more in this than, as in the other reforms which he meditated, to give to the suitors in his Court the same measure of justice which they would obtain in a Court of Equity. In the cases which we have before examined many expressions of his will have been observed shewing that such was the object which principally occupied his mind. From the judgment in the case of Goodtitle *vs.* Morgan it is clear that Mr. Justice Buller did not intend to destroy the protection of outstanding terms, that he only intended to give as good Equity, without aspiring to give better Equity than those Courts which in the English system claim the monopoly of that Article.

And if this was all that Mr. Justice Buller intended, we may reasonably infer from the general agreement of his opinions with those of his great master, that Lord Mansfield intended no more. Yet one of the highest Equity authorities now living speaks of him as if his object had been to alter at his pleasure the substantive Law of England, instead of to bring about the uniform administration of that substantive Law in all Courts which are empowered to administer it at all.

The authority we speak of is Sir Edward Sugden. In his "Vendors and Purchasers" he says—"In the same case of Doe *vs.* Pegge Lord "Mansfield observed that '*trusts are a mode of conveyance peculiar to* "'*this country.* In all other countries the person entitled has the right "'and possession in himself; but in England estates are vested in trustees, "'on whose death it becomes difficult to find out their representatives, "'and the owner cannot get a complete title. If it were necessary to "'take assignments of satisfied terms, terrible inconveniences would "'ensue, from the representatives of the trustees not being to be found. "'Sir Edward Northey's Clerk was trustee of near half of the great "'estates in the kingdom. On his death it was not known who was "'his heir or representative; so that, where a trust-term is a mere "'matter of form, and the Deeds mere muniments of another's Estate, "'it shall not be set up against the real owner.' It must excite "surprise, that Lord Mansfield should have imagined that any rule

" whose tendency it was to subvert what was peculiar to this country, " could long subsist while the peculiarity itself was allowed to exist. " As well might you admit the rule which excludes the half blood, and " yet in the face of contrary evidence, presume that a brother of the half " blood proceeded from the same couple of ancestors as the person last " seized. Is the whole system of trusts to be subverted because some- " times an obscure trustee dies without relations? or is the legal Estate " to subsist or not according to the expence which a re-conveyance may " occasion in any given case? This doctrine never could stand the test " of an accurate investigation and has long since been overruled. They " who have best understood the doctrines of Equity, have powerfully " deprecated their adoption by Courts of Law." pp. 421-2.

Lord Mansfield's object was (as our object now is) to make the administration of English Law consistent by assimilating the irrational to the rational portion of it. Yet he is here studiously represented as intent upon altering the Law itself, and assuming a dominion over it which no Chancellor ever arrogated to himself.

" As well," says Sir Edward Sugden, " might you admit the rule " which excludes the half blood, and yet in the face of contrary evidence, " presume that a brother of the half blood proceeded from the same " couple of ancestors as the person last seized."

We venture to say there is no similarity between the illustration and the thing illustrated. If the Chancellor would grant an injunction to prevent the more distant relation of the whole blood from depriving the nearer relation of the half blood of the inheritance, or would decree a conveyance from the former to the latter, then no doubt Lord Mansfield would have lamented that he should be called upon in a Court of Law to make a decision against the half blood " merely for the sake " of giving the Court of Chancery an opportunity to undo all again," and would perhaps have refused to do so. But no Chancellor ever did grant such an injunction or decree such a conveyance.

With respect to the concluding sentence of our quotation from Sir Edward Sugden, " They who have best understood the doctrines of " Equity, have powerfully deprecated their adoption by Courts of Law," we presume to remark that if by " powerfully" is meant " vehemently," and even " passionately," the assertion is undeniable; but if by powerfully is meant " with great force of argument" the assertion seems to us to be disproved by the numerous examples to which we have had occasion to refer in the course of this discussion.

That there is, however, some force of argument in these instances we have not denied. In the instance now under consideration we have not denied that there is force in Lord Eldon's objection, that " at Law the " defendant is not heard, one witness proves the case, and however " strongly the defendant may be inclined to deny it upon oath, there " must be a recovery against him." But this objection does not lie against our scheme, for our new Court, as we have already pointed out, is armed with more effectual powers of investigation than any existing Court whether of Law or Equity.

As the effect of setting up an outstanding term in Ejectment is to prevent a Court of Law from exercising jurisdiction over a subject over which it would otherwise have jurisdiction, it will be necessary to add to the Draft Act which we have sent up to Government a Proviso to the effect that whenever a suit in the nature of an action of Ejectment is brought in the Subordinate Civil Court and an outstanding term is set up against Equity and Good Conscience, the Court shall give judgment according to Equity and Good Conscience as if such outstanding term had not been set up.

The only other case we shall adduce is that of Gladstone *vs.* Hadwen. In that case it will be seen that four very eminent English Judges, Lord Ellenborough, C. J., Grose J., Le Blanc J., and Bayley J., distinctly admit the value of the principles for which we are contending, and, feeling themselves in that case unfettered by technical rules, decided upon those principles.

We are almost ashamed to appeal to the authority of great names in support of a doctrine which seems so capable of standing upon its own merits as, that one set of Courts should not be compelled to make work for another set by giving decisions which they know that other set will immediately render of no effect. But, as the truth of the doctrine is denied and great names are cited against it, we have not thought ourselves justified in neglecting that kind of support.

" Lord Ellenborough, C. J., delivered the judgment of the Court. " After stating the facts of the case, his Lordship said—The question is " whether Sill and Co. had such a property in the Bills of Exchange, &c. " as passed to their Assignees. We are of opinion that they had not. " In this case Bills were obtained by the bankrupt (Sill) under a false " pretence of giving the defendant an ample security, by delegating to " him a right to hold coffee; whereas the coffee (which was the security

" pretended to be given) was the property of another person, over which " Sill had no controul or lien, or if he had, had before pledged it in favor " of another creditor. The Bills therefore appear to have been obtained " by a criminal fraud. It has been argued, indeed, on behalf of the " Assignees, that the property vested in them under the Commission; " and in support of the argument it is supposed that, by analogy to cases " in the Criminal Law, the property may be considered as having passed " from the defendant to Sill and Co., but if it did, it was under such " circumstances as a Court of Equity on a Bill filed would have directed " the property to be restored. If that be so, we think it would be useless " for a Court of Law to permit that to be recovered which could not be " detained one moment. In Scott *vs.* Surman *(a)* Willes, C. J., says, " ' My notion is, (and that opinion is confirmed by many authorities cited " ' by Mr. Durnford in a note,) that Assignees under a Commission of " ' Bankrupt are not to be considered as general Assignees of all the real " ' and personal Estate of which the bankrupt was seized and possessed, as " ' Heirs and Executors are of the Estate of their ancestors and testators; " ' but that nothing vests in these Assignees, even at Law, but such real " ' and personal Estate of the bankrupt in which he had the equitable as " ' well as legal interest, and which is to be applied to the payment of the " ' bankrupt's debts. And I found this opinion both on the reason and " ' justice of the case, and likewise on the several Statutes made concern- " ' ing bankrupts which relate to this point. As to the reason of the case, " ' I rely upon the rule concerning circuity of action. For I think it " ' would be absurd to say that any thing shall vest in the Assignees for " ' no other purpose but in order that there may be a Bill in Equity " ' brought against them, by which they will be obliged to refund and " ' account; and, according to the case of Burdett *vs.* Willett, will likewise " ' have costs decreed against them; and so the Effects of the bankrupt, " ' which ought to be applied to the discharge of his debts, will be wasted " ' to no purpose whatever.' On these principles, and on the authority of " the cases cited, we are of opinion, that the Assignees are not entitled " to recover this property, which, if they were to recover, a Court of " Equity would compel them to restore; but that the defendant is " entitled to retain it." 1 M. and S. 525.

(a.) Willes, 402.

We shall conclude this Report by quoting from Reeves's History of the English Law an anecdote of Sir Thomas More, which rests upon the excellent authority of Roper.

" Sir Thomas More being informed that the Judges had expressed " their disapprobation of the injunctions he had granted, caused a " docket to be made of every injunction, and the cause of it, which he

" had granted while he was Chancellor; and inviting all the Judges to " dine with him, in the Council Chamber at Westminster, he introduced " the subject after dinner, when, upon full discussion of every one of " them, the Judges confessed that he could have acted no otherwise. " He then offered, that if the Judges of every Court, to whom it more " especially belonged, from their office, to reform the rigour of the Law, " would upon reasonable consideration, by their discretion, and as he " thought, they were in conscience bound, mitigate and temper the " rigour of the Law, no more injunctions should be granted by him. To " this they would make no engagement; upon which he told them, that " as they themselves forced him of necessity to issue injunctions to " relieve the people's injuries they could no longer blame him." Roper's Life of Sir Thomas More, 58, cit. Reeves 4, 376.

Upon the perusal of this anecdote the somewhat melancholy reflection naturally suggests itself to the mind, that if the Great Chief Justice whose doctrines we have been endeavoring to rescue from unmerited obloquy, and to bring into practice under the sanction of Legislative authority, had been contemporary with the great Chancellor of whom the ancedote is related, and his fellow labourer in the formation of our judicial system, the boasted antagonism of Law and Equity which is peculiar to it, would at this day have been altogether forgotten, or would have been remembered only as an antiquated barbarism scarcely to be explained by the rudeness of the times in which it had its origin.

We submit this our Report for the consideration of your Honor in Council.

C. H. CAMERON.
F. MILLETT.
D. ELIOTT.
H. BORRADAILE.

INDIAN LAW COMMISSION,
February 15*th*, 1844.

P. S. While we were writing this Report, we received a Minute from Sir Erskine Perry and shortly after, a letter from Sir Henry Roper. And just as we had finished the Report we received a joint letter from Sir Lawrence Peel, Sir John Peter Grant and Sir Henry Wilmot Seton, with a Minute of Sir Lawrence Peel annexed.

We have printed these documents, all of which relate to the subject of our Report, in an Appendix; and we beg most earnestly to call the attention of the Supreme Government to them.

We have read them ourselves with extreme satisfaction.

We must not conceal, however, that there is an important difference between the Judges of the Supreme Court at this Presidency and ourselves on the subject of bringing the parties into the presence of the Judge at the beginning of the Suit, and settling the Issues of Law and Fact, by means of an oral discussion between the parties assisted by their legal advisers (when they have any,) under the superintendence and control of the Court.

With this important exception, there is, we believe, no substantial difference between the Judges of the Calcutta Court and ourselves.

On the main subject of our Report, the Union of Equity Jurisdiction with Common Law Jurisdiction, there is certainly no substantial difference, though the means by which we have proposed to attain our common object, are not exactly the same.

On the logical principles of Pleading considered without reference to the question, whether it should be oral or written, we agree with the Judges of this Presidency and with Sir Henry Roper. But we are quite of Sir Erskine Perry's opinion as to the superiority of oral over written Pleading.

It is scarcely necessary for us to remark, that we concur in what he has said upon the joint administration of Law and Equity.

We have mentioned in our Report that we considered anxiously whether it would be better to treat the topic of the incorporation of Equity Jurisdiction with Common Law Jurisdiction abstractedly, or by a critical examination of the principal English cases which bear upon the subject, and that we decided upon the latter course.

Perhaps, for the sake of completeness, the topic ought to have been treated in both ways, and what was thus wanting to the completeness of our Report has here been supplied by Sir Erskine Perry.

In like manner we considered (though we have not mentioned it in our Report) whether we should expose what appear to us to be the inherent defects of the English system, or confine ourselves to that copy of it which we are endeavoring to reform, and in which the unreasonable and extravagant features are exaggerated in consequence of the different jurisdictions known in the English system, being here conferred upon one and the same body of Judges.

We adopted the former plan because we desired to go to the very root of the evil, and because in our Report upon a *Lex loci* for British India, we had pointed out that "in the modification of that system (the "English system) which has been introduced into the Indian Presiden-"cies, the anomalous and extravagant features are exaggerated beyond "those of the parent institutions.

"That the Chancellor (we observed) should order a man not to "apply to the Courts of Law for his legal rights; that the Courts of "Law should be bound neither to know nor care whether the Chancellor "has done so or not, that the Chancellor should not be permitted to hear "*vivâ voce* evidence, but should be obliged to send his suitors to ask the "Courts of Law to do it for him, that the Courts of Law in their turn "should not be permitted to order witnesses to be examined by Com-"mission, but should be obliged to send their suitors to ask the "Chancellor to do it for them; these and other things of the same stamp "do not look like the productions of political wisdom. We know in fact "that the only explanation which can be given of them, is not to be "sought in Jurisprudence but in History.

"But the copy of these things (we added) which has been established "in the Presidencies of India bears still fewer marks of design."

We then went on to shew what consequences might result, and do actually result from the system as it exists here, how loudly they call for a remedy, and how easy the remedy is.

We are extremely glad to find the proposition that "in a Court "constituted like the Supreme Court where the same Judges preside on "all sides of the Court, much may be done in the simplification and "improvement of a system of Equity, which it has not hitherto been "found practicable to effect in England," laid down and illustrated by Sir Lawrence Peel in a way which leaves nothing to be desired, and thus supplies what might be thought an omission in our present treatment of the subject.

An Act for establishing a Court of Subordinate Civil Jurisdiction in the City of Calcutta. *(Revised Draft.)*

N. B. What is new is printed in Italics. Clauses of the former Draft omitted in this are printed within brackets in the margin.

Whereas it is expedient that as soon as the necessary arrangements can be made, a College of Justice, consisting of the Judges of the Supreme Court at Fort William in Bengal and of the Judges of the Sudder Dewanny Adawlut, should be erected, for the ultimate decision, as regards India, of Appeals from all Courts as well in the City of Calcutta as in the other parts of the Presidency of Bengal, and it is expedient that some new provision should be made for the trial of original suits within the local jurisdiction of the said Supreme Court.

And whereas Her Majesty's Supreme Court of Judicature at Fort William in Bengal is not authorized in Civil actions at Law to examine the parties to such actions, by reason whereof the truth of the case must sometimes be concealed from the said Court, or can only become known to it by means of a Bill in Equity for a discovery, which is a proceeding unnecessarily dilatory and expensive, and much less efficacious for the manifestation of the truth of the case than examination and cross-examination *vivâ voce* in open Court.

And whereas the procedure in Civil actions in the said Court is more dilatory and expensive than is necessary for the ends of justice.

And whereas it is expedient that the Court which has jurisdiction over the subject matters of actions at Law should have power to make decrees upon such subject matters according to Equity and Good Conscience following the Law.

[And whereas the jurisdiction of the Court of Requests for the Recovery of Small Debts in and for the Settlement of Fort William, is limited to suits brought for the recovery of such debts.]

And whereas when a new Court, free from the defects above mentioned, has been established, it will be unnecessary to have any separate jurisdiction for the Recovery of Small Debts.

[And whereas it is inexpedient that the jurisdiction of the said Court of Requests should be extended.]

It is hereby enacted, that from and after the day of the Court of Requests for the Recovery of Small Debts in and for the Settlement of Fort William in Bengal shall be abolished, and that on the said day a Court for the exercise of original Civil jurisdiction in the City of Calcutta shall be established, and shall be called the Subordinate Civil Court for the City of Calcutta.

II. And it is enacted, that the said Subordinate Civil Court shall consist of as many Commissioners as to the Governor of Bengal shall from time to time seem meet, and that each of the Commissioners sitting separately shall exercise all the jurisdiction and powers herein conferred upon the said Subordinate Civil Court.

Provided always, that at least one of the said Commissioners shall be a Barrister of not less than five years standing.

III. And it is enacted, that one of the Commissioners being a Barrister of five years standing, shall be the Chief Commissioner.

IV. And it is enacted, that each of the Commissioners shall receive such salary as to the Governor General in Council shall seem meet, respect being had to the qualifications of each.

V. And it is enacted, that the jurisdiction of the said Subordinate Civil Court shall, both as regards the nature of the matter in dispute and the local situation thereof, extend to all matters for which a Civil Action at Law may be brought in Her Majesty's Supreme Court of Judicature.

Provided that whenever a suit in the nature of an action of Ejectment is brought in the said Subordinate Civil Court, and an outstanding term is set up against Equity and Good Conscience, the Court shall give judgment according to Equity and Good Conscience, as if such outstanding term had not been set up.

VI. *And it is enacted, that the jurisdiction of the said Subordinate Civil Court* shall, as regards the persons to be subject thereto, extend to all persons inhabiting or seeking a livelihood within the City of Calcutta; and that it shall be lawful for the Governor General in Council from time to time to extend the local limits of the said jurisdiction by Proclamation to be issued for that purpose.

Former Section VI.

VII. And it is enacted, that the said Subordinate Civil Court shall in every case make such decrees as may be agreeable to Equity and Good Conscience, following such law as the said Supreme Court would have administered, if the matter had been brought before it in an action at law.*

* We believe this to be a correct legal description of the decrees which the Supreme Court makes when sitting in Equity.

VIII. And whereas it is conducive to the good Administration of Justice, that the respectable part of the public should be associated therein: It is hereby enacted that the Governor General in Council may by Proclamation order that every or any Commissioner of the said Subordinate Civil Court, shall, in all suits, or in any particular class of suits, and in all proceedings therein, or in any particular proceeding therein, sit with one or more Jurors. Former Section VII.

IX. Provided always and it is hereby enacted, that the verdict of such Juror or Jurors shall be only for the information of the conscience of the Court. Former Section VIII.

X. And it is enacted, that the manner of commencing a suit in the said Subordinate Civil Court shall be as follows: Former Section IX.

1. Each of the Commissioners of the said Subordinate Civil Court shall sit at stated hours for the purpose of receiving plaints.

2. Every plaintiff bringing a suit in the said Subordinate Civil Court shall, except as hereinafter excepted, appear in person before one of the Commissioners, and shall, orally or in writing, lay before such Commissioner the facts which constitute his claim.

3. The excepted cases in which the plaintiff shall be excused from appearing in person for the purpose of making the statement of facts mentioned in the last Clause, are the same as the excepted cases specified in Clause 15 of this Section, but the plaintiff shall in all cases be permitted to make the statement of facts by an agent, provided he deposit in Court the sum of Rupees

4. The sum so deposited shall be held as a security for any thing which may be, or which may become due to the defendant, or to the Government, in respect of the matter of the suit, or in respect of the mode of conducting it: if nothing shall so be, or become due, the sum shall be repaid to the plaintiff.

5. If the plaintiff lays the facts before the Commissioner orally, the facts, whether stated of his own accord or elicited by examination, shall be reduced into form and written down by the Commissioner, or by an Officer of the Court under his direction, and shall constitute the plaint.

6. If the plaintiff lays the facts before the Commissioner in writing, the written statement shall be corrected in form by the Commissioner, or

by an Officer of the Court under his direction, if it requires such correction, and in substance, if it in any respect disagrees with the statement of facts elicited by the examination of the plaintiff: subject to such correction the written statement shall constitute the plaint.

7. When the statement of facts constituting the plaint has been made, the Commissioner, if he is of opinion that the plaint does not contain any cause of action against the defendant, or that the defendant, or the matter of the suit, is not within the jurisdiction of the Subordinate Civil Court, shall make a decree accordingly.

8. If the Commissioner is of opinion that the plaint contains a cause of action against the defendant, and that the defendant and the matter of the suit are within the jurisdiction of the Subordinate Civil Court, he shall direct a writ of summons to be issued to the defendant.

9. The writ of summons shall contain a copy of the plaint, and an order to the defendant to appear before the Court on a specified day, and to bring with him any documents which he may have in his possession, of which the plaintiff, with the consent of the Commissioner, demands inspection, or which he the defendant may think conducive to his defence, and a list of such witnesses as he supposes may be necessary for his defence.

10. If the plaintiff satisfies the Commissioner that the defendant is likely to withdraw himself from the jurisdiction of the Subordinate Civil Court, the Commissioner may direct a warrant of arrest against the defendant to be issued together with the writ of summons.

11. If the defendant is arrested on the warrant he shall be brought with all convenient speed before the Commissioner, who may discharge him from custody if he gives sufficient security for his appearance, or if he deposits a sum which the Commissioner considers under all the circumstances of the case sufficient, or if he satifies the Commissioner that he does not intend to withdraw himself from the jurisdiction.

12. On every day on which any of the Commissioners shall sit for the purpose of receiving plaints, all the plaints received shall be laid before the Chief Commissioner, who will distribute them among all the Commissioners, including himself.

13. In distributing the plaints the Chief Commissioner will endeavour to give to all the Commissioners a share of business which will

occupy an equal portion of the time of each, and to give to each Commissioner those kinds of suits which he thinks each best qualified to decide.

14. Every plaintiff and defendant in the said Subordinate Civil Court shall appear, except as hereinafter excepted, in person, on the day specified in the writ of summons, and on every other day fixed for their appearance, by the Commissioner.

15. A plaintiff or defendant may be excused from appearing in person if ill:

If absent from Calcutta:

If engaged in the Public Service:

If exempted on account of rank by the Regulations from appearing in the Courts of the East India Company:

If of advanced age:

If of the female sex:

If there is a co-plaintiff who appears in person:

If there is a co-defendant, defending jointly:

If not personally cognizant of the matter in dispute.

16. But in all these cases the Commissioner may refuse to hold the party excused from appearing in person, if he is not satisfied that the excuse is made in good faith, and that the matter of the excuse exists in a sufficient degree to justify him in admitting it.

17. Whenever an agent has been admitted in place of a party, such agent shall be permitted to do all the party might have done had he appeared, and shall be liable to be examined and cross-examined in the same manner.

18. And the Commissioner may if he thinks fit order that the party excused shall be examined in any way in which a witness may be examined.

19. When the Commissioner has refused to hold any party excused, he may order the agent who makes the excuse to summon the party on whose behalf it is made on a specified day, and adjourn the proceedings to that day, or he may make a decree against such party after examining his agent.

Former Section X.

XI. And it is hereby enacted, that as soon as the plaintiff and defendant are together before the Commissioner to whom the suit has been assigned, he shall proceed to take the pleadings and settle the demurrers and issues of fact.

Former Section XI.

XII. And it is hereby enacted, that the manner of pleading shall be as follows:

1. The defendant in answer to questions put by the Commissioner shall confess or deny each of the material allegations contained in the plaint, and shall state any matter whereby he proposes to avoid the plaintiff's right to a decree arising out of such allegations contained in the plaint, as he has confessed.

2. The defendant may demur if he thinks the plaint states a case insufficient to entitle the plaintiff to a decree.

3. The defendant shall not be precluded from demurring to any matter in the plaint because he has pleaded to it, nor shall he be precluded from pleading to any matter in the plaint because he has demurred to it.

4. The defendant shall not be precluded from denying as many of the allegations in the plaint as he disbelieves.

5. The defendant shall not be precluded from avoiding the plaintiff's right to a decree arising out of any allegations in the plaint which the defendant has confessed, by the statement of as many matters as he believes to be true.

6. The Commissioner in taking down the pleadings in writing will take care that pleas shall be kept distinct from demurrers, and that no plea shall be double.

7. The Commissioner will also take care that the pleadings shall not be argumentive, and shall state matters of fact only, and not evidence of matters of fact, and shall in other respects be such as to lead directly to distinct issues of law or fact, and that each issue shall have as much particularity as conveniently may be.

8. All the above rules of pleading shall be applied, as far as they are capable of such application, to the subsequent stages of the pleadings.

9. If after the demurrers and issues of fact have been settled a decree can be properly made without further evidence than that of the parties, and without argument on the Law or Equity and Good Conscience of the case, the Commissioner will make his decree immediately.

10. The plaintiff and defendant may, through the medium of the Commissioner, cross-examine each other as to any matter affirmed or denied on either side in pleading.

11. If any demurrer results from the pleadings which the Commissioner thinks fit for argument, he will, after consultation with the parties, fix a day for the argument on it.

12. If any issue of fact results from the pleadings upon which it is necessary to hear evidence, the Commissioner will make a note of the names of the witnesses on both sides, and of the facts which each of them is expected to prove, and the documents which each of them is expected to produce, and will grant such *subpœnas* and *subpœnas duces tecum* as appear to him to be necessary for the purposes of justice, and will, after consultation with the parties, fix a day for the taking of evidence.

XIII. And it is hereby enacted, that if any Commissioner, not being a Barrister, perceives, while he is receiving a plaint, or while he is taking the pleadings, or in any subsequent stage, that the suit is one which in his opinion ought not to proceed before a Commissioner who is not a Barrister, he may hand over the suit to the Chief Commissioner, and direct the parties to go before the said Chief Commissioner, who shall proceed with the suit. Former Section XII.

XIV. And it is hereby enacted, that if it shall appear to the Commissioner at any stage of the suit, that justice cannot be done without the presence and concurrence of some person not a party to the suit, the Commissioner may summon such person to appear, and may make a decree which shall be binding upon such person, making such order regarding the costs as shall be agreeable to justice. Former Section XIII.

XV. And it is hereby enacted, that if in the course of a suit the parties shall disagree as to the balance of an account, the Commissioner may direct that the account be referred to an Arbitrator nominated by the parties, or, in default of such nomination, to an Officer of the Court, and such Arbitrator, or Officer, will report the amount due on either side, subject to any exceptions, which the Commissioner will hear and decide. Former Section XIV.

Former Section XV.

XVI. And it is hereby enacted, that in all suits for the breach of a contract, if it shall be made to appear to the Commissioner that the contract may be performed without prejudice to the plaintiff, and that the defendant is able to perform it, the Commissioner may direct a specific performance of the contract, and enforce it by attachment.

Former Section XVI.

XVII. And it is hereby enacted, that the Commissioner in his decree shall order how much of the amount of any fees which may have been paid or be payable to any Attorney or Barrister, shall be reckoned as costs between party and party, and what other expenses incurred by the parties in prosecuting or defending the suit shall be reckoned as costs between party and party, and shall order in his decree which party shall pay costs to the other, and to what amount.

Former Section XVII.

XVIII. Provided that no fees which may have been paid or be payable to any Attorney or Barrister shall be reckoned as costs between party and party, unless the Commissioner shall be satisfied that the assistance of such Attorney or Barrister was reasonably required.

Former Section XVIII.

XIX. And whereas it is expedient that inconsiderate litigation should be discouraged, and that those who sue or defend inconsiderately should contribute towards the expenses of the Judicial Establishment: It is hereby enacted, that in every suit in the said Subordinate Civil Court the party or parties against whom the decree is made shall, if plaintiff or plaintiffs, pay a fee equal to of the value claimed in the plaint; and if defendant or defendants, a fee equal to of the value decreed.

Former Section XIX.

XX. Provided that the Commissioner may remit such fee if he shall be satisfied that the party or parties against whom the decree is made had reasonable ground for suing or defending.

Former Section XX.

XXI. And whereas it is expedient that parties to suits who prevaricate or wilfully make false statements should be punished: It is hereby enacted, that whenever the Commissioner is satisfied that any party to a suit in the said Subordinate Civil Court has, by himself or his Agent, prevaricated or wilfully made a false statement, he may in his decree impose upon such party a fine not exceeding and in default of payment may order such party to be imprisoned for a period not exceeding

Former Section XXI.

XXII. And it is hereby enacted, that the amount of the fees and fines aforesaid shall be paid monthly into the Treasury.

XXIII. And it is enacted, that the Members of the College of Justice, or the majority of them, may from time to time make such Rules for the Regulation of the proceedings of the said Subordinate Civil Court as to them may seem meet, and as are not inconsistent with any thing in this Act contained; which Rules shall be in force from their date and shall continue in force unless they shall be disallowed by the Governor General in Council within the space of from their date: provided that such Rules shall be laid before the Governor General in Council within the space of from their date. Former Section XXII.

XXIV. And it is enacted, that the Sheriff of Calcutta shall execute the process of the said Subordinate Civil Court, and shall, in respect to the execution of such process, be subject to the authority of the said Subordinate Civil Court, and shall for his trouble in executing such process receive from the Public Treasury such remuneration as to the Governor General in Council shall seem meet. Former Section XXIII.

XXV. Provided that such remuneration shall be proportioned to the quantity of labour imposed upon the said Sheriff in each month in the execution of the said process. Former Section XXIV.

XXVI. And it is enacted, that any suitor in the said Subordinate Civil Court who shall feel himself aggrieved by any decree thereof, except decrees in such suits as are otherwise provided for in Section XXVIII. of this Act, may appeal from such decree to the College of Justice for the Presidencies of Bengal and Agra established by the Act of the Council of India No. , subject to such rules as are contained in that Act; or, subject to such rules, may move the said College of Justice for an order to the Subordinate Civil Court to re-consider its decree, or for an order to the said Subordinate Civil Court for a new trial of the facts on which its decree is founded. Former Section XXV. [Section XXVII.]

XXVII. And it is hereby enacted, that the said College of Justice shall not alter or reverse any decree of the said Subordinate Civil Court, nor grant an order to re-consider any decree of the said Subordinate Civil Court, nor grant an order for a new trial of the facts on which any decree of the said Subordinate Civil Court is founded, if the decree be consistent with the Justice, Conscience and Equity of the case. Former Section XXVI.

XXVIII. And it is hereby enacted, that any suitor in the said Subordinate Civil Court who shall feel himself aggrieved by any decree Former Section XXVII.

thereof which has been made by a Commissioner, who is not a Barrister, in a suit for goods sold and delivered, for money lent, for money due for the hire of any personal property, or for wages, in which the value in dispute shall not exceed the sum of Rupees 400, may appeal from such decree to the Chief Commissioner of the said Subordinate Civil Court, subject to the same Rules, as nearly as may be, as the parties appealing to the College of Justice under Section XXVI, and that the said Chief Commissioner shall in such cases deal with the decree as the said College is directed to deal with the decrees by Section XXVII. of this Act.

[Section XXV.]

[Section XXVI.]

Former Section XXVIII.

XXIX. And whereas, although the several provisions herein before contained for the constitution of the said Subordinate Civil Court are all copied, more or less exactly, from the provisions for the constitution of the several sorts of Courts used in the administration of English Law and Equity, yet the combination of the said several provisions in one Court is new and experimental; and it may happen that a people accustomed to the Administration of Justice by Civil Action at Law in Her Majesty's Supreme Court, may feel aggrieved if they are deprived thereof, It is hereby declared and enacted, that nothing in this Act contained, shall be construed to affect the jurisdiction now exercised by the said Supreme Court in Civil Actions at Law.

G. H. Huttmann, Bengal Military Orphan Press.

SUPPLEMENT TO APPENDIX.

FROM SIR ERSKINE PERRY,

Puisne Justice of the Supreme Court, Bombay,

TO THE HON'BLE THE GOVERNOR IN COUNCIL,

&c. &c. &c.

DATED MALCOMPAIT, MAY 22D, 1844.

HON'BLE SIR,

I have the honor to call your attention to a late Report of the Law Commission, dated 15th February 1844, and to the discussion contained in the Appendix thereto, with the view of raising the question as to the expediency of establishing in Bombay a Civil Court on the principles indicated by the Law Commissioners.

2. It has been long felt and acknowledged by those, who have paid most attention to the interests of British India, that one of the most valuable boons, which it lies within the competence of Government to confer upon this vast country, consists in the establishment of a rational intelligible system of Law, founded upon the fixed principles which enter more or less distinctly into every scheme of jurisprudence, and adapted to the habits and customs of the different classes of the community. Such a system to be administered on simple rules of procedure, and with all the sanctions which experience has pointed out as appropriate for securing judicial purity and aptitude, may be safely affirmed to be the most potent instrument which a conquering nation possesses for securing the confidence and preserving the allegiance of its conquered subjects.

3. Nevertheless exceedingly little has been done hitherto towards this desirable end, and in the two systems of Law dispensed by the British in India, namely, by the Supreme Courts at the Presidencies, and by the Company's Courts in the Mofussil, there appear to be defects of such magnitude and importance as to render either of them incapable of

rendering that service to the community, which is predicable of a rational well constructed Code.

4. The chief defect in the Mofussil system appears to be, the absence of any established Law sources, from which a clear rule can be deduced on any occasion that may arise. Except in the simple cases that are provided for by the Regulations, I cannot well conceive what course a Mofussil Judge adopts towards ascertaining the rule to be applied in any doubtful question. The few treatises which are translated into English will carry a Law Student but a very little way, and the published reports would appear to show that on every intricate point a mass of conflicting opinions is sure to be elicited from the Shastries. The Regulations express that, in the cases not there provided for, the decision is to be according to *Equity and good conscience alone.*

5. But what is Equity when used in this vague sense? It is the notion of right, of just, of propriety, which the Judge, upon hearing the facts, adopts. It is a notion that in the absence of any standard to refer it to, or authority to correct it by, must necessarily vary with every Judge, just as much as the length of their respective feet, to avail myself of the illustration of Selden. An educated Englishman may study the principles of jurisprudence either in an English Law Library, or in the Literature of the Roman and Rome-derived systems, and undoubtedly a well grounded knowledge in one or other of the only two systems that have prevailed in civilized Europe, may render the dispensation of Law according to Equity and good conscience an easier task, but still as neither of these systems is of authority in the Mofussil, they neither of them contain the *norma* or standard to which a mutual reference can be made.

6. For these reasons, and from the received opinion that prevails (owing very much I believe to the high authority from whom it emanated, Sir Thomas Munro,) that eminent judicial qualities are much less needed from Civil Servants than zeal and ability in revenue matters, the legal system of the Mofussil would seem to contain no germs from which a rational scientific *corpus* of Law can be eliminated.

7. English Law on the other hand presents an immense arsenal from which the legal inquirer can furnish himself with weapons. The careful record of cases upon every doubtful point, which some hundreds of years have accumulated, affords a "precedent on the file", or a rule to be deduced by analogy, in every case that arises, and the Judge in

delivering such a rule is seen, not to be following the dictates or caprices of an arbitrary will, but to be administering the language of the Law as ordained by a superior authority. The mode in which this system is applied however, the delay, vexation, and expense, which have to be encountered before the decision of the Court is obtainable, the technicalities which so often interpose to prevent that decision proceeding on the merits of the case, and the impossibility of making the rationale of such results (if rationale there be) intelligible to a nation of foreigners,—all these combined make the English system of Law, in its present form, even less capable than the Mofussil system of rendering those services to the community which, as above indicated, a sound corpus Juris is capable of affording.

8. But it should be observed that, between the defects noted in the Supreme Court and Mofussil systems, there is an essential or necessary distinction,—for, whereas in the latter, the defect indicated is inherent, and not capable of remedy except by the institution of a body of positive Law, in the former, the evil is merely accidental, and is capable of extirpation without injury to the substantial fabric. In other words the Mofussil Courts; may be said to dispense a system of Law deficient in substantive enactments, and as to which neither Judge nor Suitor knows where to seek for an authoritative exposition of the rule; but the Law such as it is, is dispensed for the most part in a simple and expeditious manner. The Supreme Courts, on the other hand, are the organs of a complete body of jurisprudence, and their decisions proceed on vouchable and vouched authorities, which are open to all to consult; but the mode of administering the law is as costly, complicated, and dilatory, as the natural system of the Mofussil is otherwise.

9. Now it is obvious that if these evils of procedure were obviated and simple rules of practice adopted in the Supreme Court, a complete system of jurisprudence would be at work approaching to the character of a science containing full information and discussions as to every title of the Law, the principles of which would be easily intelligible to the world at large, and which would be capable of easy extension beyond the limits of the Presidency, whenever the Legislature should think fit to add to the body of actual Law prevailing in the Mofussil.

10. Such seems to be the view entertained by the Law Commission, as evinced in their late and in preceding Reports. The simplification of English procedure therefore, is the problem to which all those should address themselves, who seek to benefit the Indian community in their legal relations and exigencies.

11. The Law Commission have addressed themselves to this subject by treating of the fundamental distinction in English practice between the administration of Law and Equity, and as the rigid distinction between these two is a favorite "idol of the tribe" with English Lawyers, the Commission have shown at considerable length, and as I conceive, with complete success, that this peculiarity* in the administration of justice, fraught as it is with so much of the delay and expense alluded to above, is most easily to be abolished in the case of the Supreme Courts in India. Sir Lawrence Peel has carried out these views still further (App. p. xlvii.) by indicating in detail how several of the distinct branches of Equity could at once be placed within the jurisdiction of a Court of Law

12. The Law Commission having thus got rid of one fruitful branch of vexation and expense in English procedure, go on to point out a uniform mode in which all facts in dispute between litigant parties should be brought before the Court. "Rules of property," says Sir William Blackstone, "rules of evidence, and rules of interpretation, in both Courts, are or *should be* exactly the same : both ought to adopt the best, or both must cease to be Courts of Justice." 3 Comm. 434. But if this canon is applicable to Courts of Law and Equity when sitting apart and composed of different individuals, how much more forcibly must it apply to a tribunal, to which by an effort of the mind four or five different characters must be attributed at every sitting of the Court, and in all of which characters different rules of Law, different rules of evidence, and different modes of seeking out the truth, are recognized as the governing doctrine. The mode proposed by the Law Commission to elicit the matter in controversy in every suit is to bring the litigant parties into the presence of the Judge at the earliest possible period, and to take down from their lips, assisted by their legal advisers, the matters of fact on which the dispute in Law arises, or the matters of fact on which the parties are at issue amongst themselves.

13. In a communication which I had the honor of making to the Law Commission in June 1843, I had previously urged the adoption of a similar system, induced thereto, by observing, on the one hand, the extreme expense and delay of the prevailing procedure, by which on the

* The administration of Law and Equity by different Courts is *peculiar* to England, for although a similiar distinction existed at Rome under the terms 'jus civile' and 'jus honorarium,' these branches of the *Law* were not administered by different Judges. The Prætor both gave (dabat) actions which were of the Civil Law, and decreed (dicebat) interdicts and other equitable remedies.

Common Law side a disputed claim of above Rupees 350, cannot be decided without an expenditure of Rupees 1,200 to the parties, and by which on the Equity side, a dishonest or vindictive opponent may protract the suit for ten or fifteen years—and, on the other hand, by observing the facility, the cheapness and satisfaction to Suitors, with which claims under Rupees 350 were disposed of in the Small Cause Court, by a procedure similar in its main features to the system proposed.

14. The plan of procedure thus alluded to has been subjected to a minute and elaborate criticism by Sir Lawrence Peel, and has received from that distinguished person (expressing at the same time the sentiments of the other two Judges at Calcutta,) unqualified disapprobation. It is evident, therefore, that the arguments alleged by him deserve the most careful attention, not only on account of the high authority from which they emanate, but because they will be seen to be entertained by men, to whom the reproach, so often urged against our common profession, of reluctance to aid the cause of Law Reform, which none but Lawyers are ordinarily competent to meddle with, can in no respect be made.

15. But before I proceed to notice in detail Sir Lawrence Peel's objections, I will, for the purpose of simplifying the point under discussion, advert to a confusion with which the question is complicated, respecting the meaning of the ambiguous term Equity, and I will then recapitulate very shortly the system of procedure proposed.

16. According to the cloudy notion which prevails in the world at large as to the meaning of Equity in its technical application—a notion from which even Lawyers are not always free—the term denotes something higher and better than Law, transcending it in its range, and founded not like Law generally on the commands of the Supreme Authority in the State, but on the *non obstante* power attributed to some particular functionary of deciding cases, according to *his* views of *æquum et bonum*. It is true that Equity, on its first appearance in the only two countries (Rome and England,) where it has been known of as something distinguished from Law, assumed a form in great degree corresponding to the above notion, and the same historical ground can be discovered for its origin in either country. The *jus civile* of Rome, with its limited range of ideas, its cumbrous machinery for the transfer of property, and its superstitious adherence to symbolic forms, although all sufficient for a young and half barbarous horde, was found wholly

incommensurate with the wants and exigencies of a growing civilized people, and hence the power assumed by the Prætor of breaking through and remedying the harsh enactments of the Civil Law was forced upon him, and gladly submitted to, from the crying necessity of the case. The very same inaptitude of the Common Law of England, with its rugged feudal provisions, to meet the more complicated relations engendered by commerce and the progress of social life, is equally to be exemplified in our own history, and the stubbornness of our Common Law Professors in resisting the attempts to break through their narrow formulas, is pithily illustrated by the anecdote of Sir Thomas More, so aptly cited in the Report of the Law Commission, p. 75.

17. But those who conceive that the dispensing power which the *Jus honorarium*, and Equity, first assumed in Rome and England continued to be the distinguishing attribute of each system, most grievously err. In the former country it was soon found to be intolerable that the Prætor should lay down a special rule for each particular case according to the whim or caprice of the moment, and accordingly a distinct body of Equity or Honorary Law was soon established by the perpetual edict, into which new institutes were from time to time introduced as any other new Law. So also in England the common sense of mankind (well condensed in the above sarcasm of Selden) soon put a check on the arbitrary power assumed of overriding the Law, and a body of Equity-Law came to be established, just as precise and positive in its principles as Common Law itself. The subjects it deals with are for the most part different, being those which the Common Law from its narrow principles, or the defective machinery of its Courts, was unable to cope with. But in the cases brought before a Court of Equity, the Equity Judge proceeds as little upon arbitrary discretion, as the Common Law Judge in those cases peculiar to his Court: each of them consults his books and applies his powers of ratiocination to discover the rule applied in similar cases by his predecessors, and each holds himself equally stringently bound by such rules when discovered. It is true that Equity-Law has entirely grown out of the decisions of Equity Judges, and therefore it follows that new rules are from time to time laid down by them as the occasion arises; but the same remark is almost equally applicable to the Common Law; such is the system of English jurisprudence. Lord Holt by a single decision introduced, as it were, and established the whole Law of Bailments. Lord Mansfield by a series of decisions may be said to have created the Commercial Law of England. Lords Nottingham and Hardwicke did no more for Equity, than the above great Judges for Common

Law. The most complete similitude exists therefore between the two systems, and, except for the uncouth phraseology, the department of Civil Law which is now divided by Law and Equity, might be much better distinguished into Common Law-law, and Equity-law.

18. It may be expedient in a highly populous and civilized community, to parcel out between different tribunals the various subjects on which litigation is likely to arise,—thus, the exposition of wills and enforcement of the marriage contract, or domestic relations, may be committed to one Court; trusts, accounts and questions on partnership to another; breaches of contract and enforcement of simple *jura in personam* to a third;—and this is what occurs in England. On the other hand all these different jurisdictions may be concentrated in one Court, having appropriate machinery and requisite powers for discharging all its various functions effectually;—and this is the case with the Supreme Courts in India. But what is contended for and maintained is, that, in either of these cases, the rule which is pronounced by the Court whether it be a Court of Law or a Court of Equity, or a Doctors' Commons' Court, (in which not even the nominal distinction exists,) or whether it be one Supreme Court—the rule, I repeat, to be laid down is, *the substantive Law of the land* irrespective of any nominal distinction into Common Law-law, or Equity-law.

19. The above is conceived to be a true though succinct explanation of the relative meanings of Law and Equity, but whether it be theoretically correct or not, it is undoubtedly the practical account of the mode in which questions whether of Law or Equity are disposed of by the Judge, by which it will be seen that the same definite attributes and fixed character may be predicated of each, and are recognized as belonging to each, respectively.

20. This being so, it is submitted that, in all cases, but more especially in those where the functions of Law and Equity are centred in one Court, the mode of bringing the facts in controversy before the Court should be the same. Whatever has been seen in experience to be an effectual instrument towards eliciting the truth should be adopted in all cases where the truth is a matter of research. If therefore the vivâ voce examination of parties in open Court has been found more effectual than examination upon interrogatories in a close room, and in the absence of the Judge and of the parties, there is no doubt as to which of these two should be adopted as the general rule. If again the advantages which Equity practice presents, by subjecting the parties

in the suit to full disclosure and discovery of all they know, are so great as almost wholly to counterbalance the defective mode of eliciting the truth by interrogatories, experience and reasoning evidently suggest that these two potent modes of ascertaining the facts should be combined, and that the inferior and contradictory processes should be abandoned. If, lastly, it has been found by experience that the great portion of the delay, vexation and expense, which attend litigation in the technical procedures devised by practitioners under the English and Rome-bred systems,* are owing to the mass of written pleadings and various agencies which are interposed between the Suitors and the Court, it seems most desirable that a recurrence to first principles should be made, and that every facility should be afforded to Suitors of communicating with the Judge in open Court, without the intervention of legal agency, except when the assistance of professional learning and acuteness is required.

21. The following three articles therefore form the basis of the system of procedure which I ventured to propose, and which the Law Commission also adopt as the rules of practice for their proposed new Court.

1st. Vivâ voce examination of witnesses as the general rule.
2nd. Examination of parties to the suit.
3rd. Appearance of parties before the Judge in the first instance, and oral pleadings under the authority of the Court.†

* It seems to be conceived by some that by adopting what is termed 'summary procedure,' a great portion of the existing evils of equity practice may be got rid of; Sir Lawrence Peel appears to incline to this view, App. p. xlix. But it must not be forgotten that summary procedure is also technical, and that all the same causes are at work to make it just as dilatory, expensive, and counter to the interests of suitors, as so-called regular procedure. In the continental systems, from which summary procedure has been taken, a form of proceeding exists called "*summariissimum*;" intended to provide for cases of pressing emergency, but it seems that practitioners contrive to make this *most summary* proceeding occasionally last 20 years. See Von Savigny's Necht des Besitzes, p. 653, 6. ed.

I see by a late Athenæum that the King of Prussia is proposing to introduce oral pleadings into the German Courts, in order to correct the same evils which we are encountering in English procedure.

† The Law Commission, in reference to the views expressed in my Minute on special pleading, have stated a stronger dissent of opinion than I conceive to exist between us. In that Minute I described the course of pleading in Equity, and pointed out, and objected to, the necessary delay and expense which it occasioned. But in order to prevent it being supposed that these objections grew out of a bigotted preference for the system in which I had been myself educated, I went on to deprecate special pleading equally strongly, as the general form of procedure. But unquestionably I do not at all dissent from the use which the Law Commission

22. I now apply myself to Sir Lawrence Peel's objections. To the two first propositions I do not understand that any objection is made. It would seem therefore that all the Judges of the Supreme Court at Calcutta concur in recommending these great improvements in procedure. Sir Henry Roper is also of opinion (App. p. xxv.) that the first rule should be adopted, and I do not conceive that he objects to the second; he also thinks it feasible that the pleadings should be framed under the supervisance of an Officer of the Court.

23. The objections of Sir Lawrence Peel, therefore, apply to the third point only, viz., to oral pleadings, and the appearance of the parties before the Judge. Neither of these propositions is very distinctly combated in terms, but I take them to be tacitly involved in the following propositions, which I conceive to be the pith of the objections urged by Sir L. Peel.

1st. The plan proposed is not applicable to Calcutta, because it throws additional duties upon the Judges, and their time is already fully occupied. p. xxxiv.

2d. The plan requires a Judge of higher qualities than can be found, and even the highest qualifications would not be sufficient to ensure success, because such Judge would have too much power. *Ibid.*

3d. Equity would be administered blindly and erroneously, because the Judge would not be certain that all the facts were before him. p. xxxv.

4th. Decisions would go against one of the parties by surprize, or if adjournment were made to enable him to meet the facts of the case brought against him, nothing would be gained by the new plan.—*Ibid.*

propose to make of certain of the rules of special pleading, which have been found effective in practice, and undoubtedly so far as the "rules of pleading are conformable to the logical operations of the mind in the logical management of a dispute," (see Sir H. Roper's Minute,) they not only should not be, but cannot be, departed from in any scientific system. I conceive however that if written pleadings are abolished, and, with them, the greater part of the technicalities with which written pleadings are accompanied, it is a misnomer to apply the designation of special pleading to a new system in which only a few of its rules are adopted. The system of special pleading properly so called I continue to think wholly inapplicable to India, it is almost impossible from the circumstances of the country that a race of men like special pleaders, whose natural habitat seems the Temple, should flourish in this country, and from the remarks of Sir L. Peel, I should gather that the Statute of Beaupleader is as much a dead letter at Calcutta as it is at Bombay.

5th. Uncertainty would be introduced into the Law, and consequently, increase of litigation. p. xxxv.

6th. The latter result would also flow from the abolition of opinion business.

7th. Both the latter results conjointly from decisions proceeding "on notions of natural justice or Equity, and not upon the adopted system of Municipal Law." p. xxxv.

8th. Variance would be introduced between the Law of England, and that prevailing at Calcutta. *Ibid.*

9th. The system introduces a violent change, and does not enable the preferable course of introducing improvements by steps. *Ibid.*

10th. Various objections to the appearance of parties before the Judge in the first instance, founded on the difficulty of the operations to be performed by him, and the *odium* he will be exposed to. p. xxxvi., et seq.

24. Now undoubtedly a formidable list of specious objections is here presented, and if only one-half of them is well founded, it were undoubtedly wiser '*stare super antiquas vias*,' and to reject the proposal at once. But upon examination I think it will be found that the greater and substantial portion of these objections may be resolved into two propositions—First, the proposed plan will introduce misdecision, and consequently uncertainty, into the Law. Second, the plan gives the Judge too much power. Of these in their order—

25. First, as to misdecision. This class of objections proceeds upon two assumptions; 1st, that the proposed procedure will not bring the facts in each case to the notice of the Court; 2d, that upon the facts so brought, the Judge will decide on arbitrary notions of justice and equity, and not on the substantive Law of the land. Now the first assumption is a fair hypothesis to be made; the question is as to a new system of procedure, and it is a complete answer to it, if it can be shewn that it will fail in eliciting the facts necessary for a decision, all that can be required in such an hypothesis is to bring forward sufficient arguments to support it. But the second assumption is altogether untenable and gratuitous. No change is proposed to be made in the substantive Law of the land, but only in the mode in which the controversies of

Suitors are to be brought forward, in order to have that Law applied to them. There is nothing therefore whatever in the premises to warrant the conclusion that Judges will decide more erroneously in one mode than in the other; indeed it is clear to demonstration that the decision will proceed in every case according to the particular Judge's knowledge of the English Law, and his powers of applying it to the facts laid before him. It is difficult therefore to account for the appearance of this argument in the discussion, except by supposing a momentary confusion of the rules of procedure with the substantive Law of the land, and by referring to the equivocal meaning of the term Equity, both of which points have been discussed above.

26. The first assumption, therefore, is all that needs to be noticed, viz., that natural procedure will not bring out the facts. But what arguments have been brought forward by Sir L. Peel to warrant this assumption? Not one; and it is evident that in a speculative inquiry the authority of no man (and I have much pleasure in seizing the opportunity to state how highly I esteem the authority of Sir Lawrence Peel) can establish a proposition except so far as it is supported by solid argument. To me, it appears that the great advantages of the scheme consist in its aptitude to admit of all facts in issue between the parties being readily brought before the Court, and that it is directly calculated to obviate those evils in the existing system, by which essential facts are so often shut out, and by which so many decisions pass irrespective of the merits of the case. Every practitioner's memory will furnish him with innumerable cases at the Assizes where the parties through a mistake of their pleader, or negligence of their attorney, have been, what is called "turned round on the pleadings," or put out of Court by a failure to prove a notice or signature, and the volumes of reported cases are equally full of decisions where the interests of the Suitors have been concluded for ever on some blunder or other of their legal advisers, and wholly irrespective of merits.

27. But specific instances are brought forward to show, how ill the personal appearance of the parties before the Court, and oral pleadings, would work in practice; and as such instances, ordinarily, take more hold of the mind than abstract reasoning, it is well to examine them somewhat minutely. The cases referred to are Few v. Guppy, and an anonymous case decided at Calcutta. The first was a question of specific performance of a contract respecting real estate, in the latter a construction had to be put on an ill-worded Marriage Settlement.

28. Now it may be observed generally of cases of this description, that they form but a small minority of the total number of the legal controversies which arise in the community. In the majority of cases, say five out of six, (see App. p. iii.) in which recourse is had to Courts of Law, the resistance of the defendant is founded, either on want of means, or in the desire to stave off the claim for a time by reliance on "the Law's delay." With respect to such cases, I apprehend that it can hardly be disputed that too great facility cannot be afforded to plaintiffs to enforce their legal claims, and that no evil can be incurred, but on the contrary great advantages to public morality, by withdrawing from dishonest or tricksy defendants all opportunity of defeating their opponents by chicanery. This class of cases therefore presents no difficulty as to their being disposed of in the first instance, by the appearance of the parties before the Judge, without any preliminary expense—so far therefore a great advantage is gained for the majority of cases and of honest Suitors. There remains the remaining portion of cases above noted, namely, that portion in which some disputed question of Law or fact requires to be decided by the Court.

29. Now it is evident that this class of cases is divisible into those where the parties are wealthy enough to avail themselves of the assistance of Counsel, and into those where they are not. In the latter of these cases, according to the system proposed, the *onus* would undoubtedly be thrown upon the Judge of lending its assistance to the quasi-pauper parties, (for if actual paupers they would have the assistance of Government,) and of eliciting from them the actual question. This might be a disagreeable office for the Judge, but I cannot see in it any thing but a benefit to the public. It is true, that in such cases the Court, in the absence of any forensic advocacy on either side, would often fail in discovering points material to the issue, points which the parties themselves might be blind to, and the Law delivered would be frequently inferior in quality to what it would have been, after hearing all that legal acuteness and industry could suggest. But the same observation is equally true of every system that exists, or that can be conceived. Proof of all the facts relating to a given case, and bringing to bear all the Law applicable to such facts through the organs of the greatest intellects, which the legal profession can afford, are two operations necessarily demanding great time and expense. And to expect that two paupers contending for a hovel on the Common will have their case equally solemnly and well decided, with a case like that of Lord Scarborough v. Lumley, where many thousands a year was depending, were to expect an impossibility. An approximation to this result is

attained by every approach made towards simplifying and generalizing the substantive body of the Law itself, but in the mean time and indeed at all times, the most important desideratum for poor Suitors is, that their legal disputes should be determined by the Judges of the land as speedily as possible, and with as little destruction as may be of their only capital, time—even at the risk of the occasional misdecision which summary procedure necessarily, but not exclusively, involves.

30. With respect to the class of cases where a doubtful question arises, and where the parties are in a condition to avail themselves of legal assistance, very little need be said. The eminent advantage of such assistance is so obvious that no one would fail to avail himself of it, when within his reach, if his rights or possessions became the subject of legal discussion. Sir Lawrence Peel is not at issue with me on this point. He does not conceive that the adoption of a simple system of procedure would supercede the employment of Counsel, at all events at Calcutta, but it is evident that what is true of Calcutta in this respect is true of all the world, for the principles at work are those of human nature. Although therefore Sir L. Peel argues the question in one view as if Counsel would not be employed in difficult cases, as that view is neither his nor mine I need not consider it further in this place.*

31. To apply the above observations to the cases, Few v. Guppy, and the anonymous one at Calcutta. If they belonged to the pauper class, which apparently they did not, they would have to be placed by the Judge in a train for decision, and to be decided according to the best lights of his legal information and natural capacity. That they would be occasionally ill-decided is to say no more than that man is fallible; but that they would receive a less share of attention, or of anxiety on the part of the Judge to be right, than similar cases now meet with in England or in India, there seems no reason whatever for supposing. If, on the contrary, the cases were such as enabled the employment of Counsel, the conduct of the suit or litis-contestation would be accompanied with all the assistance, which professional advocacy is now capable of affording to Suitors, with the additional advan-

* I entertain, indeed, a strong conviction that the existence of a simple system of procedure would open a much wider field for forensic talent and employment than at present. The elicitation of truth amidst conflicting statements, the clear exposition of principles from circumstances "immersed in matter," and the logical reasoning required to bring these principles within the rules of the Law, are operations that will be so immeasurably better conducted by men trained in legal science and controversy at the bar, than by the common herd of mankind, that it seems to me clear their services can never be dispensed with. And if so, all that money now spent in useless procedure, will form a larger fund for their employment.

tage of securing to the latter an indemnity against any damage, which under the present system he is so frequently exposed to by mistakes fallen into during the interlocutory proceedings in the suit.

32. The assumption, therefore, that the natural mode of procedure will not enable the facts of each case to be brought before the Court, appears to me to be warranted neither by the arguments brought forward, nor by the two cases cited, and consequently all the objections which involve this assumption as an enthymeme, fall to the ground.

33. The second main objection is, that the plan will place too much power in the hands of the Judge. Now no one is more alive than myself to the evils of attributing undefined irresponsible powers to the judicial authorities, and although I conceive that Mr. Bentham has gone ludicrously far in the surveillance he proposes to exercise over Judges, (whom, truth to say, he often treats little better than pick-pockets,) I confess that I should be sorry to see any of the existing checks over their discretionary power diminished. But it appears to me that India is the last country where any apprehension on this score needs to be entertained. The Judges of the Supreme Courts have very little of the moral support which Judges in England derive from the influential classes of society. They do not form a part of, and have no connection whatever with, the Local Government of the country, and they are occasionally placed in something like direct conflict with it. They exercise a decided and direct control over the governing classes of the community, who have been said by a very high authority* occasionally "to confuse power and right in a manner in which nobody confuses them at home," and such control, however lightly or temperately administered, can scarcely prove otherwise than galling. The public press represents, the interests of the executive classes almost exclusively, and therefore has additional motives to the tendency of a public press generally, to keep a rigid look out for judicial peccadilloes. The bar, lastly, either from local circumstances, or the absence of that easy gradation to the bench which occurs with the bar in England, have little of that esprit de corps which distinguishes the profession at home, and from their connections with clients, with the governing classes, and with the press, they are more prone to concur in any carpings and cavils at judicial authority, than to support it even in its due exercise by their moral influence. These circumstances may not be prejudicial in their result to the public interest, however annoying occasionally to the Judge personally, (and Sir James Macintosh alludes to them feelingly more than

* Sir Benjamin Malkin. Letter to Governor of Singapore, on the Government Records.

once,) but most undoubtedly they afford potent sanctions against any undue exercise of power.

34. The specific case pointed out by Sir L. Peel (App. p. xxxiv.) as giving greater power than that which a Judge ought to possess, consists in the power attributed to him of deciding "whether a suit shall be instituted in the first instance or not." But, with deference, it appears to me that this power is no greater than what the Judge possesses, and most frequently exercises at present. If a plaintiff applies for a writ and fails to persuade the Judge, either by himself or his Counsel, that he has got a cause of action, I can see no greater exertion of power in a refusal of the writ, than is displayed under the present system when the Judge nonsuits the plaintiff, equally, after hearing his own view of the case as urged by his advocate. An arbitrary abuse of this power has been checked hitherto by the publicity of proceedings, by the license of speech in Counsel, by the power of the party to bring forward his case again and again, and by appeal; to say nothing of the other motives influencing every Judge more or less strongly, love of reputation, love of justice, fondness for the art, &c. These checks have proved amply sufficient hitherto to prevent wanton misdecision; they would exist with equal force in the system proposed, and the only innovation is that the power would be exercised without the parties being required to expend Twelve Hundred Rupees to bring their case into Court.

35. The other objections, not included in the above two propositions, are of a minor character. If the plan is not applicable to Calcutta, because the time of the Judges is already fully occupied, it would be a misplaced economy on the part of Government to withhold from the community a sufficient number of Courts, by which Law might be administered at one-tenth of the present expense on the Common Law side, see App. p. v., and at a still greater ratio of diminution both of time and expense on the Equity side.

36. But there need be no additional expense to Government, for it appears to me, I confess, that the system which prevails in India for the Judges of the Supreme Courts to sit conjointly at the trials of matters of fact, is warranted neither by principle, nor by the home practice, which in all other matters has been so servilely followed. All trials of fact in England (with the exception of the nearly obsolete trial at bar,) are tried before a single Judge, whether at Equity, or at Nisi Prius, or in Criminal Sessions. Another exception indeed exists in the

case of trials before country gentlemen at Quarter Sessions, but this is so confessedly the worst tribunal in England, that it can hardly afford an example for the Supreme Courts in India. If then a recurrence to English practise were made by the latter Courts, there would probably be quite sufficient time for the Calcutta Judges to get through all the cases that would arise on the new system, singly in the first instance, and conjointly as a Court of appeal, from the decision of any one of the three Judges. This last advantage is wanting to the Presidencies of Madras and Bombay, but it is a deficiency in a judicial system so greatly to be deplored, that I cannot help supposing that, at some time or other, the Government will supply it. And what leads me more strongly to this conclusion, is the fact that the appointment of a third Judge would add little or nothing to the expenditure now made, as it would supercede the necessity of employing non-professional Judges at the Petty Sessions, and Court of Requests, and so commit the whole judicial business of the Presidency to its legally educated and responsible Judges.

37. The objection as to the inability to introduce the scheme proposed gradually, and without violent change, has been so completely anticipated by the cautious provisions of the Law Commission, that it is unnecessary to notice it further.

38. I have thus satisfactorily to my own mind, and after a most careful perusal of Sir Lawrence Peel's Minute, disposed of the various objections which he brings against oral pleadings, and the appearance of the parties in the first instance before the Judge. But I cannot be blind to the inclination we all have to regard one's own arguments with complacency, and to undervalue those of one's opponent. I think it very probable therefore that, on a question of this kind, the reasoning which I conceive to be altogether untenable, may appear to others of overwhelming force, or at all events equally specious with that which I have urged, I therefore address myself to the practical proposition which I mentioned in my first paragraph.

39. It will be seen that the question at issue is, as to the results which may be predicted from the employment of a new system. It is in great degree therefore a question of prophecy. But there is this distinction between me and my opponents, and this great advantage on my side, that I am able at every stage of the inquiry to point at the successful operation of a system in practise conducted upon the principles I contend for. In the Small Cause Court at Bombay, the pleadings are conducted under the superintendence of an Officer of the Court; and the parties

are examinable at each stage of the inquiry. The result of the first rule is that during the three years and upwards that I have had a seat upon the bench, I have never witnessed the decision of a cause upon any other ground than the merits. The result of the second rule is, that in every case where conflicting testimony occurs, the immense advantage obtained by the power of sifting the parties themselves, enables the Judge to form a much clearer and more satisfactory conclusion than in any other mode in which disputed facts are brought before the Court. The result of the two rules combined is, decision of suits at one-tenth of the ordinary expenditure, and a satisfaction to Suitors with the mode in which their cases are disposed of, that I do not apprehend arises upon litigation on other sides of the Court. It appears to me therefore that Bombay offers peculiar advantages for making an experiment of the species of Court proposed by the Law Commission. There seems to be a desire on the part of the community that the powers of the Court should be extended, and the Memorial lately presented to Government with a prayer to this effect was supported by the recommendation both of Sir Henry Roper and myself, when Government did us the honor of consulting us. The Bombay Judges have time upon their hands which might be devoted to the new Court, and if the Court of Requests were left as it is for the present, the experiment might be made without a single Rupee of additional expenditure. Nor would any violent change be at all introduced. The Small Cause Court would remain the exclusive Court for suits under Rupees 350 only; for all other causes, it would be at the option of plaintiffs to take them there or not, and we may be quite sure that the acuteness of mankind to discover their own interests, would soon ascertain whether the fears prognosticated by Sir L. Peel were imaginary or not. If the scheme did not work well, it would be abandoned at once; if the public on the other hand found it to accord with their interests, the disputed problem is solved.

40. I have not had an opportunity of communicating with the Chief Justice on this suggestion, as I am writing this paper at the Hills, but as I am proposing a scheme, which undoubtedly throws more Court business upon the Judges than heretofore, I think it only fair to him to state that I am perfectly willing to undertake the sole sittings of the Small Cause Court, so as to allow of all the causes decided by me, (on which any difficulty may arise,) to go up on appeal to the Chief Justice, as a sort of Chancellor. This is the only method in which I can suggest to myself, the formation of an efficient Court of Appeal, where there are only two Judges, and although the arrangement would place the Puisne Judge in a more subordinate post than he at present fills, I am

quite ready to submit to this infinitesimal loss of dignity and to the extra work contemplated, for the sake of the public benefit, which I anticipate from the experiment.

41. I have only, finally, to apologize for the wide range and controversial tone which this paper has necessarily assumed, and to observe that my justification consists solely in the opinion I entertain, that the questions here discussed, have a much wider range than the narrow limits of Bombay.

I have the honor, &c.,

(Signed) E. PERRY.

Calcutta:—G. H. Huttmann, Bengal Military Orphan Press.

SECOND SUPPLEMENT TO APPENDIX.

To the Hon'ble C. H. CAMERON and
D. ELIOTT, Esqres,
Indian Law Commissioners.

Hon'ble Sirs,

The Judges of the Supreme Court of this Presidency have had the honor to receive from you a Letter of Sir Erskine Perry, addressed to the Hon'ble the Governor of Bombay in Council, dated Malcompait, May 22d 1844. As this Letter contains a reply to that portion of my Minute of the 13th February 1844, addressed to you, which questions the propriety of adopting Sir Erskine Perry's plan of reforming the mode of procedure in the Queen's Supreme Courts of Judicature in India, which plan he propounded in a Minute of the 3d June 1843, addressed to the Law Commissioners, I think it necessary to submit to you some observations upon it. That plan is embraced in five propositions stated in the Minute which are as follows:

1. All Suits shall commence on the personal application of the party to the Judge, on Oath if required, and a Summons or Capias shall thereupon issue.

2. On Summons, &c., being served, the parties shall attend before the Judge in open Court, and if any matter shall appear to be in dispute, a day shall be fixed for the hearing, and the proceedings in the Suit regulated.

3. All Evidence shall be given vivâ voce, and the parties in the Suit shall be examinable on Oath at any stage of it; but in certain cases to be regulated by the Judges, the presence of Witnesses and parties may be dispensed with, and Evidence may be received in a written form.

4. In every case the Court shall decide on the principles of Law or Equity arising out of the facts without reference to the form of Suit.

5. All cases shall be decided on the merits or adjourned till further facts can be procured to enable such decision.

Of these propositions I combated the first, second and fourth. To the third I stated and entertain no objection. If adopted it would be proper however to subject to certain restrictions the right of one of the parties to examine his adversary; unrestricted it would be turned to purposes of vexation and oppression.

The Judges of this Court having embodied their unanimous opinions upon the subject of Law Reform in a Minute which was drawn up by myself incorporating in it some important and valuable suggestions from Sir H. W. Seton, their next step was to propose to the Government that the Judges should frame a Draft Act in conformity with their opinions upon the reform proper to be adopted, to be laid before the Government for its consideration. To this proposal a favorable reply was received. The Draft Act is now far advanced, and will shortly be laid before the Government and the Law Commission. The plan of this Act is one of reform of the existing procedure. If the real defects of the existing system are remediable, surely it would be more agreeable to the cautious system of reform which has prevailed in England, in all things to reform the old than to try as is recommended a new system of procedure. I think it right to express my opinion in the first instance that the defects imputed to the existing system are overcharged. Those imputed to the mode of procedure on the plea side of the Court in the Letter now under review are, that "essential facts are often shut out, "by which many decisions pass irrespective of the merits of the case." That parties are often "turned round on the pleadings" or put out of Court by a failure to prove a notice or signature; and that these instances are so many "that every practitioner's memory will furnish "him with innumerable cases at the Assizes where these things have "happened," and it is added "that the volumes of reported cases are "equally full of decisions where the interests of the Suitors have been "concluded for ever on some blunder or other of their legal advisers "and wholly irrespective of merits."

The reference here is not to Bombay, Madras or Calcutta, but to England. It is not shewn how often these consequences have ensued in the Supreme Court at Bombay. How they could occur in that Court to the extent suggested, if an Excellent Rule passed by Sir Edward West be still in force there, I am at a loss to understand; since under that Rule and the lately enlarged powers of amendment in the cases of variances between allegations and proofs which I take it

for granted are in force in Bombay, the Court would be able to obviate the greater part of the imputed miscarriages. That Rule provides " that the Court may at any time before or at the trial of any cause, " amend any formal errors or mistakes in the plaint upon such terms " as justice may require." And it is added that " the above Rule shall " be considered to extend, in particular, to cases of Contract in which " too many parties may be joined as plaintiffs or defendants, if the " Court shall be of opinion that the defendant has not been misled by " the mistake and that justice will in the particular case be obtained by " the amendment." If a pleading be defective and be demurred to, the party is always permitted to amend, if he will swear that he has any merits. The technicalities of special pleading sometimes not frequently however produce expense by giving rise to demurrers on points of form and it is a serious evil but one not irremediable. My own experience here first at the Bar, and afterwards on the Bench, and for nearly sixteen years as a constant attendant on Courts of Justice in England, both at the Assizes and in London enables me to say, first that at Calcutta during the whole period that I have been conversant with the business of the Supreme Court, failures on points not going to the merits of the cause are of very rare occurrence indeed; my memory supplies me with no instances of any decision against the merits on such grounds: it supplies me but with two instances of a party pleading a plea not applicable to his alleged ground of defence ; in those cases the Attorney had put the pleas on the record without consulting Counsel. But I have every reason to think that there were no merits in either case to be excluded. As to England my experience enables me to say that the number of such failures is very small indeed proportionably to the whole number of causes. The comparison must be made between the whole number of causes and the causes in which such failures take place. I am not defending the continuance of the causes which lead to such failures, a remedy may and ought to be applied to them. It has been erroneously assumed that in the Supreme Court of this Presidency, justice is often defeated by reason of errors of procedure. It has even been supposed that Ejectment Suits were in danger of being defeated here by outstanding terms. Outstanding Terms are not in use here, and rarely are they in use in Commercial places. The change in the Law as to variances has almost put an end to failures of the kind imputed. A failure to prove a notice or a signature, a failure to lay a foundation for the reception of secondary Evidence, may occasionally exclude some facts from being in Evidence, a failure ascribable in general to the negligence of the party. But this may be remedied by an adjournment of the cause. If the Law does not now give full effect to such a remedy ; ample powers of adjournment and still more ample powers of amendment than now

exist may be conferred. No change is proposed in the Rules of Evidence; therefore wherever the Rules of Evidence exclude the truth now, they would equally effect that exclusion under the new system; and amendments in the Law of Evidence even to the reception of the Evidence of the parties are as easily applicable to the existing system as to any that could be substituted for it. The objections above referred to are applied only to Common Law proceedings. To the proceedings in Suits of Equity the objections are different. The length of the pleadings in Equity Suits is a serious evil. To make the remuneration of the practitioner depend on the length of the proceedings is a mischievous practice and should be corrected. The emoluments of Attorneys are not high; but it is required to place them as to this on a different footing. The nature of the remuneration should be such that it should not be more burthensome to the Suitor than is necessary for the required object. It is immaterial whether certain Suits be instituted in a Court of Law or a Court of Equity in considering the question of their reasonable cost. Many of them are of a nature to require time and repeated adjournments, from the length and intricacy of the accounts or transactions involved in them, the exact nature of which is often unknown to both litigants. Such Suits if instituted whether the examination be by Witnesses vivâ voce, or by written depositions, whether the enquiry be conducted in Court, or before the Master, cannot but be long in duration, and heavy in expense. Where both parties are honest and wise, the investigation of matters of mere account is referred in referrible cases. The mere substitution of one form of procedure for another will not in the cases under consideration pervent the cause being both long and expensive. The very nature of many Suits renders it indispensably necessary that there should be pauses and long pauses in the conduct of them. A man alleges a case of spoliation, or other case of secret fraud, the circumstances of which are not clearly known to him, though the fraud or spoliation is on strong grounds of probability believed. The fraud or spoliation may not have been committed by the party sued, though he may be answerable in respect of property affected by it. The very nature of such a case, not an unfrequent one, renders it impossible to have the cause decided at one hearing. The Plaintiff must often allege his case conjecturally. The Defendant must have time to consider the case, enquire into circumstances, deliberate on his answer, and prepare that answer with thought and care. A vivâ voce examination alone would neither be beneficial to the Plaintiff nor fair to the Defendant. The answer when obtained throws new light on the Plaintiff's case. He amends it and asks a further answer: This may again be such that the Plaintiff with a view to new or further relief may think it the wisest course to amend. All this would take place in the so-called natural

mode of procedure. Finally all the knowledge that either side can gain from the other being obtained, it is to be considered whether the Evidence so furnished be sufficient, and time must be had to consider whether the Plaintiff will proceed with or abandon his Suit, or seek for further Evidence; all these necessary pauses may be opprobriously termed delays, the word being understood in an evil sense, but it is obvious that such pauses are essential to the safe conduct of such investigations. Even under the most simple mode of procedure, before a lay Judge, adopted by the parties, without legal Advocates, or settled forms of procedure, with confrontation and oral pleading and with no precedent or Rules to bind or govern, the course of inquiry into a transaction of this character would assume a shape little different from the one supposed, and in which delays analogous to those occasioned by amendments would be indispensable. The evils imputed to the Equity Courts are generally overcharged, because a comparison is instituted between a mode of procedure applicable to comparatively simple cases and one framed to meet those of the greatest complexity. We proposed to resort in Equity to summary procedure in simple cases, and to regular procedure in others; the real objection as it appears to us being the indiscriminate application of regular procedure to all cases. The summary procedure where it has been adopted as in Bankruptcy and in some cases of Equity Jurisdiction has been successful, and we are not disposed to reject the benefit of this experience by any alarm at the statement that Summary Suits last for twenty years in Prussia.

On the plea side delay is not imputable. Whatever be the defects of the procedure there, it need work no delay. A Plaintiff sometimes does not press on his Suit but he cannot be long delayed in its prosecution. That Suits even on the plea side are expensive I admit, but not to a degree exceeding the expenses of similar Suits in English Courts or in other Courts in this country trying causes of equal magnitude or in most Colonial Courts elsewhere. It is not shown that under the proposed new system, the cost of a Suit would be reduced, and it appears to me to be quite an erroneous view of the subject to attribute the cost of a Suit on the plea side to the form of procedure. Except in special cases where the service of process, the travelling expences of Witnesses, or the execution of Commissions at a distance cause great expense, the larger portion of the cost of a Suit is in the remuneration of professional Agency. Sir Erskine Perry appears to think that this would not be diminished under the system which he recommends, he says "I entertain "indeed a strong conviction that the existence of a simple system of "procedure would open a much wider field for forensic talent and "employment than at present. The elicitation of truth amidst conflict-

" ing statements, the clear exposition of principles from circumstances " immersed in matter and the logical reasoning required to bring " these principles within the Rules of the Law, are operations that will " be so immeasurably better conducted by men trained in legal science " and controversy at the Bar, than by the common herd of mankind, " that it seems to me clear their services can never be dispensed " with. And if so, *all that money now spent in useless procedure will "form a larger fund for their employment.*" One of my objections is that the costs would frequently be increased by the necessity of restoring to professional Agency in the preliminary proceedings before the Judge. The expenses of Witnesses and of the service of process would not be affected by the change; the expense of pleadings is trifling exceeds as it includes fees to Counsel, and the Counsel's whole receipts would not be diminished. Nothing then would remain but the fees of Court. Now it is not contemplated that the costs of maintaining the Court Establishments by the new system should be thrown upon the Government instead of upon the Suitors; If the Government is willing to ease the Suitor by taking a portion of this charge on itself, it would no doubt be a considerable relief, but that relief would not be the consequence of the substitution of one system of procedure for another. It has not indeed been attempted to be shewn that the proposed scheme would diminish the costs of a Suit, my own belief is that it would enhance them.

Reference has been made to the Small Cause Court at Bombay. I do not doubt that this Court has worked well, and I should be exceedingly glad to give my assistance to the working of a Small Cause Court on the same plan. It has this advantage over other Small Cause Courts that it has Judges as highly qualified as those who preside over Courts which try the causes of the more affluent—I think this a great advantage and the Judges of this Presidency have offered to procure it for Suitors by giving their services as the Judges of a Small Cause Court. But the Small Cause Court at Bombay is not conducted upon the plan recommended in the propositions which I combated. It does not appear to differ from other Small Cause Courts where the procedure is according to the course of the Common Law, except in this that the parties are examinable, and to this I never stated any objection. Sir Erskine Perry states that during the time he has known it no decision has passed there except on the merits. I believe the same may be truly predicated of many Small Cause Courts in England proceeding according to the course of the Common Law, the causes being of a simple kind and the appropriate pleadings presenting little difficulty. The difference in our views however respected not the best mode of trying Small Causes, nor Pauper

Suits, but the propriety of superseding by a plan which he suggested, the whole civil procedure of the Courts on all sides of them and without exclusion of any causes from its operation. In the Bombay Court there are pleadings, an Officer is interposed between the Judge and the Suitor; he acts as the legal adviser of both parties; he puts the pleadings into their form; the errors are considered as official mistakes and are corrigible; but the experience of the success of such a Court so proceeding as to simple cases affords no answer to my objection to the adoption of the five propositions above enumerated. These did not recommend the mode of procedure prevailing in the Small Cause Court, but a different mode of procedure which was termed "the natural mode," consisting of a preliminary examination into the facts of the case, and a partial decision on them, and then, "if there appeared to be a cause of action," a regulation of the form of procedure, which regulation was to follow such investigation; This plan was to be applied to all causes indiscriminately, one effect of which would be the abolition of a Court the excellence of which was admitted on all sides for the purposes to which it was limited.

The propositions to which it is assumed that my objections applied are thus stated in the Letter to the Bombay Government. The following three articles form the basis of the system of procedure, which I ventured to propose, and which the Law Commission also adopt as the Rules of practice for their proposed new Court.

1st. Vivâ voce Examination of Witnesses as the General Rule.

2nd. Examination of parties to the Suit.

3d. Appearance of parties before the Judge in the first instance and oral pleadings under the authority of the Court.

The propositions to which my Minute referred, are those which I have setforth in the commencement of this Letter. They appear to me to be far from identical in meaning with the three propositions lastly enunciated.

To oral pleadings and the appearance of the parties before the Judge in the sense in which the Law Commissioners recommended them I then offered no objection; although I entertain objections to both, because it was my object to discuss merely the propriety of adopting the propositions which the Minute contained. In one sense every thing that a litigant utters before his Judge may be termed an oral pleading:

But the Law Commissioners in recommending a resort to oral pleadings, declare in favour of the principles on which that form of procedure is based whether the allegations be delivered orally or in writing. The strictures contained in the following passages from the Minute struck at the principles of the science, its aim at separation of the Law from the fact, and its effect in bringing the allegations down to certain and definite disputed points. "In reprobating Equity practice, however, "so strongly as I do, I by no means wish to have it supposed that I "desire to supersede it by that of Common Law, or to make special "pleading the channel for bringing controversies before the Court. On "the contrary I think it wholly unsuited to the country. A creature of "English Lawyers and arising out of the simple vivâ voce pleadings of "Suitors at the Bar, it has shaped itself at home into perhaps not an "ineligible mode of trying certain questions, but wholly with reference "to the peculiarity of the tribunal before which it is employed. All the "Rules of special pleading which have been framed with reference to "any definite object, have had in view the separation of the Law from "the facts so as to *enable the former to be disposed of by a tribunal "sitting in one place* and the *latter by a different tribunal sitting in "another.* The facts having to be tried by a Jury who are collected at "some trouble and expense *from different parts of the country and who "can only be held together for a limited* period of time, it naturally "*became an object to reduce the issues to be tried to the narrowest "possible point on which the parties could be content to fight the ques-"tion.* Juries also being composed of men caught at random, and in "whom the accomplishment of reading even was not considered a sine "quâ non, it became further desirable not to complicate the record or "bother their brains with more than a single question. Hence the "various Rules having these objects in view. But it is needless to "observe on the total inapplicability of any one of them to a Court "which combines the provinces of Judge and Jury, to a Court perma-"nently fixed which has no duties to call it away to private business at a "distance and which may sit de die in diem, to dispose of every question "that may fairly arise in the case, to a Court finally composed of "educated Lawyers who it may be taken for granted would not object "to a party bringing forward his case on a double aspect, i. e. in two "different forms when such a course is legitimately founded on the facts. "The application of special pleading to the trial of facts in this country, "I believe to be in its results as follows, that often the true point in "dispute is not elicited at all; that often the Law and the facts are "so jumbled up together that a hasty decision is called for from the "Judges on the former, and which after being pronounced, it is too "much to expect from the fallibility of human nature can easily be

" made to appear wrong to the Tribunal who pronounced it; lastly, that " when it does enable cases to be tried on the merits it condemns the " losing party to 1,200 Rs. costs, and that even when he does not " defend the Action at all, it condemns him to 450." Such were the views entertained as to the origin and operation of the existing system.

I proceed to point out other differences between the two plans, viz. that now under consideration and recommended by the Law Commissioners, and the one originally proposed in the five propositions. The Law Commissioners propose to proceed experimentally. No probationary Scheme was recommended in the Minute. Their Court would have jurisdiction at the outset over Common Law Causes alone. The other plan would have embraced all Suits of whatsoever character. The Law Commissioners follow the general plan of averment first and trial after. The other proposes a preliminary trial prior to the framing of the allegations. The Law Commissioners do not propose to confer on the Judge the power of prohibiting a suit or a defence upon disbelief of the honesty of either. Sir Erskine Perry contends that this power ought to be conferred. Lastly, the Law Commissioners do not recommend that a party may sue for one thing and recover for another, or that a defendant may plead one legal defence and prevail on another not pleaded, or plead a legal defence, and prevail on an equitable right disclosing itself amongst the Evidence which would be the necessary consequence of the other system but only that the legal right of either party shall not be subjected to the risk of failure through errors in procedure.

My objections are then stated thus: " 1st. The plan proposed is " not applicable to Calcutta because it throws additional duties on the " Judges and their time is already fully occupied." This was not alleged as to mere oral pleadings or the appearance of the parties before the Judge. The Judges of this Presidency procured an Act to be passed enabling them to sit apart in cases where before that Act they could not do so, and they then wrote to the Government stating that they thought they should be able by a division of their Judicial labours to give the attendance of one of their body as a Judge of a Small Cause Court. The proposal that one Judge should sit alone to try all causes has not their concurrence. The Court in Civil cases performs the functions of a Jury; and it may be questioned whether the abridgement in any way of these functions is a step in the right direction.

" 2d. The plan requires a Judge of higher qualities than can be " found; and even the highest qualifications would not be sufficient to " ensure success, because such Judge would have too much power."

The first part of this objection was directed by me, and confined to the hypothesis of the exclusion of professional aid; which hypothesis I did not adopt.

The last part of it is a distinct objection. With uncontrolled professional aid a Judge of high attainments might work the plan efficiently; but with professional aid I cannot understand how the plan would work satisfactorily unless the management of the cause was left uncontrolled. To enable the Judge to controul the management in such a case, is to confer a dangerous power, too great to be generally entrusted, odious in its character as repugnant to the free spirit of English institutions, and one not likely to be acceptable to British subjects including a Bar and Attorneys whether in England or India. A failure by the Judge in such an instance of controul, would subject him to obloquy and derision. To these evils would be added in most cases delay, expense and inconvenience arising from preliminary proceedings incurred before arriving at the stage where suits now begin, viz. the filing of the Plaint. This is the substance of my objections on this head which in the condensation of them are not accurately conveyed.

Another objection of mine is stated as follows:

"3d. Equity would be administered blindly and erroneously, "*because the Judge would not be certain that all the facts were before* "*him.*" My objection was that the facts would often not be evolved on which the Equity ought to be decreed. This objection applies to the proposal, that the suit may be instituted for one purpose, and a recovery be had for another. If this were to be the rule, then no doubt it would be necessary to abolish special pleading, and to leave the allegations of either party at large instead of reducing them to precise Issues: for there would be no advantage in bringing the allegations down to a point if Evidence not pertinent to the Issue were admissible.

The objections of mine arranged as the 5th, 6th, 7th and 8th in the classification of them in the Letter before referred to are put forth when arguing on the hypothesis of the exclusion of professional agency. That exclusion I observed would multiply error, and uncertainty, and so increase litigation, which increase also would spring from the inability to resort to the opinions of Counsel. The reference to Courts proceeding according to the dictates of natural Justice, Equity and Good Conscience, is merely illustrative; I never thought or asserted that it was proposed to work any change in what is termed Substantive Law, but only in

procedure: nor should have been suspected of confounding distinctions so elementary.

My objection that the system introduces a violent change is met thus—" the objection as to the inability to introduce the scheme gradually " and without violent change has been so completely anticipated by the " cautious provisions of the Law Commission that it is unnecesssary to " notice it further." It was recommended in the Minute to abolish the whole existing procedure without option to the Suitor, without experimental trial. The Law Commissioners recommend the creation of a New Court, upon their plan, confining its jurisdiction in the first instance to Common Law Causes with the option to the Suitor to use the old procedure by resorting to the existing Court. Their recommendation is not objectionable on this ground, but the cautious provisions of the Law Commissioners instead of removing add weight to my objection.

It is no where said by me " that the natural mode of procedure will " not enable the facts of each case to be brought before the Court."—Sir Henry Roper having stated his fears that Sir Erskine Perry's plan if adopted would by its effects on the profits of professional Agents, deprive the parties of their assistance, I examined the probable operation of that system under either aspect, stating at the same time my belief that such consequences would not result at least at Calcutta. Supposing the parties to be deprived of such professional aid, I said the proposed procedure would fail in many cases in bringing the facts and the Law appropriate to the facts correctly to the notice of the Judge, but on the other hypothesis of the existence of such professional aid, I raised no such objection; my objections in that case were: that if the management of the procedure rested with such Agents, as I thought it ought to rest, then a needless, inconvenient and expensive preliminary proceeding in a suit would take place, of no benefit to the Suitor. But that on the other hand if the management were to devolve on the Judge, it would inspire jealousy and dissatisfaction; his errors would be viewed with very different eyes from the errors of a Judge deciding in the present mode, and that it would be a course at variance with the freedom of action which the spirit of our Laws encourages.

It is conceded that if deprived of professional aid, the Judge would often pronounce Law of a worse quality, that is, error, there being no degrees as to the qualities of Law. The objections which I stated to the plan in this aspect of the case, are not met.

It is therefore incorrect to state that I assume that the "natural mode" will not elicit the facts in either case.

The Rules of Evidence properly forbidding the introduction of proofs irrelevant to the points in Issue, it could rarely happen if the Rules of pleading be maintained that all the facts connected with a new case, of which facts in Evidence might open a view would be elicited: Independently of the dangers of surprize, and that fraudulent parties with some sinister object might present their case not in its true light, there would in every case be the uncertainty whether facts did not exist of which the party might not know the importance on the legal or equitable bearing of the case, and it could scarcely ever be safe to pronounce a decision on a case of a different character from that of the one presented originally. These were my objections not that it was recommended that Law as well as Equity should give place to the dictates of each Judge acting according to his views of natural Justice and Equity. This case is merely glanced at as an element of uncertainty in cases where such a rule prevails.

It remains only to consider the answer to my objection that too much power would be conferred on the Judge. It is said in answer to this the Judge may now nonsuit. Nonsuit he cannot unless the plaintiff choose to submit. The plaintiff may and does frequently refuse to be nonsuited. And if he choose to be nonsuited he may sue again and again. Over the defendant the Judge has no power of controul unless application be made to his favour, as to plead several pleas or the like; when he may impose terms. There is not the least resemblance between the two cases. The truth of all the facts in the plaintiff's case is assumed when a nonsuit takes place on the ground that he has not established a legal right to sue. It is proposed that a Judge not believing the facts which if true would give a right of action should not allow the suit to be instituted. By parity of reason if he suspect or which is the same thing believe on a part hearing, a defence to be fraudulent, he must refuse leave to plead. This at least is what I infer from the following passage in the Letter—"in the majority of cases, say "five out of six, in which recourse is had to Courts of Law, the resist- "ance of the defendant is founded either on want of means or the "desire to stave off the claim for a time by reliance on the Laws delay. "With respect to such cases I apprehend that it can hardly be disputed, "that too great facility cannot be afforded to plaintiffs to enforce their "legal claims; and that no evil can be incurred, but on the contrary "great advantages to public morality by withdrawing from dishonest

" or tricksy defendants all opportunity of defeating their opponents by " chicanery. This class of cases therefore presents no difficulty as to " their being disposed of in the first instance, by the appearance of the " parties before the Judge without any preliminary expense." This might be so if the dishonest defendant admitted himself dishonest; and submitted to the claim awed by the presence of the Judge. I think there is no ground for supposing such a result. A plaintiff brings an action on a written instrument purporting to be signed by the defendant. The parties are summoned, the defendant says it is not his writing, and signed without his authority, and denies the contract. The Judge disbelieves him. The defendant offers to prove it so. Is the Judge to say I will not give you the opportunity, you shall not by your dishonest conduct harass the plaintiff? Is not this in effect deciding the cause at its very outset? Put the converse, the Judge believes the defendant: Is he to dismiss the suit on his impressions? For it cannot be said in either case that the cause is heard unless each party has the right of bringing his witnesses; then if this be conceded, they will come with their Witnesses, Counsel, and Attorneys on the preliminary investigation. Their neighbours may suspect the nature of the case; may even know how the truth is, the Judge can know nothing about it. He must not act even on private information; but only secundum allegata et probata; To permit it to be otherwise would give rise to the most foul suspicions, and would often occasion the greatest abuses. The cause must either be decided then, or left to be brought in the usual way on the parties' statements of their rights. I am at a loss to understand how the Judge can distinguish between the real and the alleged facts without in effect adjudicating upon them, and how this can be done with a view merely to determine how the alleged facts shall be stated. It cannot be certainly known till the facts are all known whether a defence is dishonest or bona fide. It may be suspected. The administration of an oath to either party as to the truth of his case affords practically little security against vexatious or dishonest litigation. This practice does prevail in many cases. In the Ecclesiastical Court each party may compel the other to swear to the truth or his belief in the truth of his allegations. In practice it is of little or no avail. A fraudulent defendant put to his oath generally does not hesitate to support his fraud by perjury: A fraudulent plaintiff if put to his oath would seldom hesitate to swear to the truth or his belief in the truth of his case. Upon a confrontation even and a public examination, with cross-examination to boot, the result would generally be false swearing, positive contradiction, conflicting statements; the Judge might suspect where the truth lay, but he could have no such conviction as would justify him in acting on his impressions; The only course to be adopt-

ed would be to proceed on the statements of either party as at present with a view to the hearing. I have no knowledge whether Sir Erskine Perry's observations on the character of causes be correct as applied to Bombay; but they do not correctly describe the causes which are heard before us at Calcutta as defended causes; Most of these from whatever motives the claims or defences may spring, are difficult of decision from the great conflict of testimony in them; and it would be impossible for any Judge to dispose of them by any investigation short of regular trial. In Exparte cases it would not be safe to dispense with a trial of the plaintiff's title and claim to damages. It is obvious that in no case would the plaintiff be wholly saved the expense of a suit even where the defendant meant not to dispute any part of the plaintiff's demand, since the plaintiff must needs have a suit instituted, the plaint prepared and the process of the Court awarded against the defendant before he could lay a foundation for a judgment; He would not of course forego the power over his debtor that a judgment would give him. This preliminary expense would not be saved by the new plan, nor do I see any prospect even in such a case of its being materially reduced. The mere expense of drawing a Plaint would be spared, nothing more, and that would be balanced by the new sources of expenditure before alluded to.

The Law Commissioners' recommendations are now urged on the Bombay Government by Sir Erskine Perry; It detracts in my mind much from the weight which I should otherwise give to his recommendations that he views them as substantially the same with the mode of procedure which he recommended. I do not intend now to discuss the soundness of their views as to the general fusion of Law and Equity; as to the preference of Assessors to Juries, or as to the propriety of giving an Appellate Court a discretion to decide otherwise than according to Law. Without discussing these and some minor points of detail on which I differ from them, I must with unfeigned respect for their opinions state, that I believe their recommendations as to oral pleading, the framing of Writs, and the power of demurring and pleading simultaneously to the same pleading would all be found inconvenient and mischievous in their exercise.

Some inconveniences in my opinion are inseparable from bringing the Judge and the Suitors into close communication before the hearing of the cause. These have not place, or at all events in a less degree if as at Bombay in the Small Cause Court, an Officer of the Court and not the Judge act as the professional adviser of the Suitors. It is to the application of either system to cases where the necessity for it does not exist that I object. I think there are no grounds for supposing that the

facts would be better elicited, or the pleadings more skilfully framed under the new system. I believe it to be of very rare occurrence that that which the party means to advance as his case is mistaken by or not revealed to his professional advisers. Its truth they cannot always know, nor would the Judge be at all more informed upon the point, or have better means or more ability to discover it. The inquiry is not at this stage into the truth of the facts, but whether all facts the client should allege are alleged: It is in my opinion an incorrect supposition that the Judge in general would frame the proceedings more skilfully than Counsel. In simple cases no error does or can creep in without the most culpable carelessness. And such errors are of such exceedingly rare occurrence, that they cannot furnish grounds for a change attended with many serious inconveniences. Nor would the devolution of such business on a Court necessarily in every case guard against similar risks. In complicated cases an action is rarely brought into a Court without the previous opinion of Counsel upon it. Now if it could be safely assumed that Advocates are always inferior in diligence, quickness, learning and sound judgment to Judges, it might be contended then that errors would be less frequent if the Judge did the preliminary work which now falls to the Advocate. The Bar in India however stands to the Bench in India, in no different position as to the above qualifications from that in which the Bar in England stands to the Bench in England, where the superiority is by no means always on the side of the Court over all Barristers. It may I think safely be predicted that there would be no such blind confidence in the Judge that a party having a claim to enforce, would be content to attend alone, and state his case to the Judge trusting to his penetration and skill. He would come in the majority of cases attended by his Counsel and Attorney. The Judge would not always be able to hear his application the moment he was ready to make it; other claims would be under consideration. Some cases would require to be adjourned. New attendances would be the result, occasionally there would be arguments aud the citation of authorities, attendances to remove the impressions of the Judge, and to correct the mistakes both of fact and law into which he would not unfrequently be in danger of falling. If the Judge thinking the action untenable dismissed the case, an appeal would lie and pending the appeal the plaintiff might lose his evidence, or the defendant become insolvent or leave the jurisdiction; the very publicity of the plaintiff's proceedings would be a warning to a fraudulent defendant to go out of the jurisdiction; Even after the Judge had settled the plaint to his own satisfaction; it would be sometimes necessary to consult with Counsel whether the plaintiff could safely proceed with the record in that state. The Judge's pleadings being

demurrable, and Judges not infallible, and clients and their advisers not cringing, or timorously complaisant, the Judge's pleadings would be occasionally laid before Counsel for approval. But when these sources of expense and delay were exhausted, new ones would open. No succinct and printed form of Writ would there be at hand which would merely require to have a few blanks filled in and to be sealed; a special Writ reciting the whole plaint must be framed in the Office in every case which would require in the majority of cases to be translated; and often several copies must be made. The expense of this would be considerable. The delay would often be attended with most serious consequences; Every party who could afford it would certainly attend by Counsel on the second appearance, and it would rarely be safe for either party to come so unattended. Then would come applications to excuse attendance, moved on Affidavits; How easy it would be to allege the causes admitted as grounds of excuse, and to support such by Affidavits it is superfluous to point out: These applications would be resisted. Motions for Attachments against absent parties would be frequent, these motions would be resisted; the expense of forcing attendances would be heavy; imprisonment for contempts frequent; there would be danger from the full communication of the case of each party to his opponent; that perjury and forgery would even more abound than at present, and that attempts would be made to intimidate or corrupt Witnesses whose names would probably transpire. On the other hand the anticipated advantages are expedition, a more accurate knowledge of facts, and a more skilful pleading of those facts resulting as it appears to me from the presumed superiority of the Judge over the professional advisers of the party; an opinion if entertained unfortunately too flattering of the industry, quickness, discernment, learning and skill of Judges who would under the plan proposed be called upon to shew themselves at once good Attorneys, good Advocates and good Judges.

The proposed resort to oral pleading is considered to be a return to a former practice of the English Courts. The Judge however never framed the pleadings of the party or directed the framing of them when what is termed oral pleading was in use. The practice of it is to be learned only from the Year Books. The earliest Year Book goes not further back than the Reign of Edward 2d. Lord Coke says "It "is worthy of observation that in the Reigns of Edward the 2d, "Edward the 1st and upwards, the pleadings were plain and sensible, "but nothing curious evermore having chief respect to the matter, "and not to forms of words. But even in those days the forms "of the Register of original Writs were then punctually observed, "and matters in Law excellently debated and resolved." It is said

by Lord Hale in his history of the Common Law of England, that in the Reign of King John "we find frequently in the records of his time "fines imposed pro stultiloquio which were no other than mulcts "imposed by the Court for barbarous and disorderly pleading; and "from whence afterwads that common fine arose pro pulchre placitando "which was indeed no other than a fine for want of it." "In the "Reign of Edward Third," says Lord Coke, "pleadings grew to perfection, both without lameness and curiosity; for then the Judges and Professors of the Law were excellently learned, and then knowledge of the Law flourished; *the Serjeants of the Law, &c., drew their own pleadings.*" Hence it appears that the Judges fined for unskilful pleading instead of aiding parties to plead: that pleading reached its excellence, its brevity and regard to substance when Serjeants, &c. drew the pleadings; and its decline is attributed by Lord Hale in a great degree to the overnicety of construction of words by the Judges themselves, in which indeed he says the Counsel participated. It is obvious therefore that pleading may be reformed by referring to the ancient models of brevity and precision, without devolving on the Judge the duties which then fell on the Advocate. Expedition was no result of oral pleading. On the contrary Imparlanees were its fruit, and some delay must necessarily result from it. It is not my intention to enter upon an investigation of the origin of pleading in what Courts it first had its rise and came to perfection; nor of the origin and early nature of Juries; nor of the distribution and dispatch of business in the Courts of the Kingdom at those early times, but it is sufficient to say that I believe Sir Erskine Perry's facts on which he supports his theory as to the system of pleading in a passage which I have before quoted are not only not supported by but are at variance with the best historical accounts we have of the History of the Common Law of England.

I have the honor to be,
Hon'ble Sirs,
Your most obedient humble Servant,

LAWRENCE PEEL.

COURT HOUSE,
the 22d February, 1845.

To the Honorable C. H. CAMERON and
DANIEL ELIOTT, Esquires,
Members of the Indian Law Commission.

Supreme Court House, 14th February, 1845.

Honorable Sirs,

I have had the honor as well as my learned Colleagues the Chief Justice and Mr. Justice Seton to receive from you a copy of the Letter of Sir Erskine Perry, Puisne Justice of the Supreme Court of Bombay, of date the 22d May 1844, addressed to the Governor in Council of that Presidency, and the learned Judge having in that Letter observed on the Minute of Sir Lawrence Peel, the Chief Justice of the Supreme Court here, of date the 13th February 1844, which Minute was stated in the Letter of the Judges of this Court to your Honorable Board of that date to contain the opinions of us all upon the matters it referred to—I think it right that your Honorable Board should be in possession of my individual views stated by myself upon the subject of that Minute, and the learned Judge's observations. In concurring in the statement that Sir Lawrence Peel's Minute embodied the opinions of us all, I intended to state that it did so in all that was material to the questions raised and to that opinion I adhere.

I think it may be proper to preface the expression of my reconsidered opinion with an avowal which may lessen its weight with such as are more disinclined to be ranked among the *laudatores temporis acti* than I am—namely, that in the course of now not a very short life during which my attention, however imperfectly or with results of however little value, has been pretty constantly turned to affairs of a public nature and to questions of Law, I have never observed any total abrogation, or even very sweeping reform of what has been established for ages in matters of Government Legislation or Jurisprudence, which I did not think I could trace even in the minds of men of learning and ability either to an imperfect consideration of the actual result and mode of operation of existing institutions, or a dangerous love of novelty, or an ill considered aim at what was mistaken for simplicity, but would be found to be in truth the mother, if not itself the essence, of practical confusion. I confess therefore that I have approached the question raised by Sir Erskine Perry with great distrust, and my opinion must accordingly be taken with this allowance by such as think an allowance necessary in this respect.

Sir Erskine Perry commences by observing that "one of the most "valuable boons which it lies within the competence of Government to "confer upon this vast country consists in the establishment of a "rational intelligible system of Law founded upon the fixed principles "which enter more or less distinctly into every scheme of Jurispru-"dence, and adapted to the habits and customs of the different classes "of the community, and that in the two systems of Law dispensed by "the British in India, namely, by the Supreme Courts at the Presi-"dencies and the Company's Courts in the Mofussil, there appear to be "defects of such magnitude and importance as to render either of them "incapable of rendering that service to the community which is pre-"dicable of a rational well constructed Code."

In paragraph 2 it is said that "such a system," by which I presume is meant "a rational well constructed Code," "administered on "simple rules of procedure, may be safely affirmed to be the most "potent instrument which a conquering nation possesses for securing "the confidence and preserving the allegiance of its conquered subjects."

A rational and intelligible system of Law, (and every system to be rational must be intelligible) for the administration of Justice in matters of Civil right must be adapted to the habits and customs of every community which it affects; for out of their habits and customs arise many of their most important Civil rights. If inconvenient, they may be altered by Law like other Civil rights. They are part of the *objects* not the *means* of administering Justice. I am not aware of any essential defects in the *system of Law* dispensed by the Supreme Courts,—and in the Mofussil there is no *system of Law—a rational and well constructed Code* of Laws is a thing, which, not being of an imaginative frame of mind, I can form no conception of till I see it, if by that is meant a new invention to be framed by learned and speculative men. But I am quite certain that no such invention can be framed by human intellect which shall be adapted to the habits and customs of any community. The Laws of every country grow up with the habits of the community. The most important part of them, the *lex non scripta*, or what by English Lawyers is called the Common Law, is nothing else than its customs, which the other part of the Laws, the *lex scripta*, or the body of the Enactments of the Legislature, has occasionally endeavoured in particular parts to settle, to correct, to improve or to abrogate, as the necessities arising in the progress of society appeared to require. Such Laws therefore cannot but be adapted to the habits and customs of the community since they have grown out of them, and are in truth, the written as well as the unwritten a declaration of them not a system which seeks

upon some imagined principles to correct or remodel them, or to substitute others in their stead—a learned man, who would systematise them, invents nothing but arranges what he finds established. This was done at Rome by the private Lawyers, Gregorius and Hermogenes, and under the authority of the Emperors, i. e. of the Legislature under Theodosius and Justinian. So in England the Law as declared by the decisions of the Courts has been compiled and arranged under its different heads by Plowden, Fitzherbert, and Comyn and Viner, &c. But neither the Roman Lawyers or Emperors, or the English Lawyers, invented or suggested any thing, but arranged in a more or less perfect and systematic form what they found to be established as the rules of the Law. Their compilations were Digests of the Laws as they stood not newly invented Codes.

The customs of nations which concern the relations of domestic life as marriage and concubinage—the relation of father and child—of guardian and ward—of master and slave or servant—may be peculiar to the nation or the part of the globe which it inhabits. Thus they were in many respects different in ancient Rome from what they are in modern Europe. They are different in Europe from what they are in Asia. They are different among the descendants of the ancient Persians who inhabit Asia from those of the Mussulmaun inhabitants of Asia, and the Hindoos—as are those of the Mussulmauns and Hindoos from each other. The rights of succession and the religious creeds and observances are also different; among which latter are to be ranked the distinctions of caste among the Hindoos. These customs and customary rights must be considered sacred by a just Conqueror so long as they continue to preserve their hold upon the manners and happiness of the people—and his Laws, if just Laws, will protect them from violation—But the relations and rights which arise out of the dealings and transactions of life in the common intercourse of society, classed by the Roman Lawyers under the heads of Contracts—Quasi Contracts—Delicts and Quasi Delicts—or the Equitable liabilities incurred by indirect or unintentional wrongs are so much founded in the esssential notions of justice and right common to all mankind that the ancient Law of Rome in these matters will be found to be very nearly the same with that of the nations of Europe and Asia at the present moment The Mahomedan Law upon these questions is said to be copied from the Theodosian Code, and certainly most of the Precepts of the Hindoo Law upon them are contained in the Digest of Justinian. These Laws upon these subjects are so much the same with the Law of England that I do not just now recollect an instance of its being necessary to resort upon any of them to any doctrine of Mahomedan or Hindoo Law in deciding a dispute between Mahomedans and

Hindoos, except upon matters of prescription or pledge which being every where matters of positive regulation must be different in different nations, and the conveyance of land and other immoveable property to which among Asiatics the feodal principles of the Law of England cannot apply. The wisest Conquerors and those who succeeded the best were of opinion that the best and most effectual means of securing the confidence and obedience of the conquered was the establishment among them of a good system of Law well administered. But they introduced no new Codes but administered justice in Britain according to the Roman Law by Roman Magistrates, and the actions and process of the Roman Law, so that any one who reads Bracton will see that in Contracts, Quasi Contracts, Delicts and those Equitable liabilities styled by the Roman Lawyers Quasi Delicts, in all matters not Feodal, the Common Law of England is founded on the Roman Law learned by our British Progenitors from the Romans themselves. Nor in the *System of Law* which they administered, or *the Constitutions or Forms of their Courts* did they concern themselves with the habits and customs of the conquered community, well knowing that good Laws well administered are, with the exceptions I have mentioned, suitable to the habits and customs of every community, and adjudicate justly upon all the rights which arise from those habits and customs, and which are consistent with good morals.

Sir Erskine Perry observes that in the English Law "the careful "record of cases upon every doubtful point which some hundreds of "years have accumulated affords a 'precedent on the file' or a rule to "be adduced by analogy in every case that arises, and the Judge in "delivering such a rule is seen, not to be following the dictates or "caprices of an arbitrary will, but to be administering the Language of "the Law as laid down by a superior authority." This description of the delivery of the rule by the English Judge, which is perfectly correct, and coincides very much with Montesquieu's, seems to embody the perfection of a *Corpus Juris* practically unless the rules are bad rules. What follows of the delay, vexation expence and technicalities which it is said so often interpose to prevent the decision proceeding on the merits of the case and the impossibility of making the rationale of such results (if rationale there be) intelligible to a nation of foreigners which combined make the English System of Law in the present form even less capable than the Mofussil System of rendering those services to the community, which, as above indicated, "a sound Corpus Juris is capable of affording," I am compelled to dissent from, as in my opinion founded in mistake—but it is enough to say that it is not proved; and if it were true it would not lead to very clear conclusions to consider *the mode of*

applying a System as part of *the System itself.* The form of a Writ does not constitute an essential part of a *Corpus Juris.* It is a material adjunct to the system and may be so framed as aptly or inaptly to carry the system into effect. But Sir Erskine Perry goes on to remark that "the "mode of administering the Law (in the Supreme Courts) is as costly, "complicated and dilatory as the natural system of the Mofussil is "otherwise." All this of costly, complicated and dilatory is without the statement of any facts by which it is proposed to justify it; and I understand the cost and delay of cases in the Company's Courts at least to equal those in the Supreme Courts, with a material difference in the satisfaction afforded to the Suitors, and in considering this charge of expence and delay in the administration of the Laws of England, which can no longer be classed with the complaints of common and uninstructed persons, since it is preferred by such high authority, it were well to remember what very intelligent and learned men, Blackstone and Montesquieu, have recorded as their opinions upon the necessary structure of the Laws of a wealthy and highly civilised people living under the protection of a just Government. "This care and circumspection "of the Law (of England) in requiring that every complaint be accu- "rately and precisely ascertained in writing and be as pointedly and "exactly answered, in clearly stating the question either of Law or of "Fact—in deliberatively resolving the former after full argumentative "discussion and indisputably fixing the latter after a diligent and "impartial trial must be owned to have given handle in some degree to "those complaints of delay in the practice of the Law which are not "wholly without foundation but are greatly exaggerated beyond the "truth. **** Some delays there certainly are and must unavoidably "be in the conduct of a suit. *** These arise from liberty, property, "civility, commerce and an extent of populous territory. ***** In "Turkey," says Montesquieu, "where little regard is shewn to the "lives or property of the subject all causes are quickly decided. The "Basha on a summary hearing orders which party he pleases to be "bastinadoed and then sends them about their business, but in free states "the trouble, expence and delays of Judicial proceedings are the price "that every subject pays for his liberty, and in all Governments;" he adds "the formalities of Law increase in proportion to the value "which is set on the honour, the fortune, the liberty and life of the "subject.

"The Law Commissioners have addressed themselves to this subject, "(i. e. the simplification of Legal Procedure) by treating of the funda- "mental distinction in English practice between the administration of "Law and Equity, and as the rigid distinction between these two is a

" favorite ' idol of the Tribe' with English Lawyers, the Commission " have shewn at considerable length, and as I conceive with complete " success, that this peculiarity in the administration of justice, fraught " as it is with so much of the delay and expence alluded to above, is " most easily to be abolished in the case of the Supreme Court in India.

" Sir Lawrence Peel," the learned Judge, adds " has carried out " these views still further (App. p. xlvii.) by indicating in detail " how several of the distinct branches of Equity could at once be placed " within the jurisdiction of a Court of Law."

My respect for the learned Judge, and the Law Commission whom he cites, is such that I am compelled to attribute it to my own obtuseness of intellect that I cannot see how any person acquainted with the practice in English Courts of Law and Equity can fail to discover that this peculiarity which arose in England from accidental causes—the rigid adherence of the Common Law Courts to their own rules, and their defence of them as connected, as they truly in great measure were, with the liberties of the country—and the encroaching spirit of the Civilians and the Church, backed by great forensic learning and the mutual jealousy of both parties—has contributed more to the singular perfection of the English Law and the certainty with which it is administered, and the celerity and cheapness of Common Law proceedings and the infrequency of Law Suits compared with the vast multitude of civil relations of contracts, of injuries, and of Equitable liabilities, which subsist in so populous a country, and among a people so advanced in civilization in wealth and in commerce than the most refined invention of the ablest speculator could have done or promised to do.

The learned Judge adverts to a confusion respecting what he calls the ambiguous term *Equity* and the cloudy notion which prevails in the world at large as to its meaning. But that ambiguity and cloudy notion not having any place in the mind of any moderately instructed English Lawyer it is unnecessary to notice them here. Suffice it to say that the questions of disputed right which arise in a civilised community may be classed under two general heads, those which concern the ordinary and daily transactions of life, which are of constant occurrence and easy investigation and demand a prompt decision,—and those which arise out of complicated and lengthened transactions, which are of more rare occurrence, which demand a protracted investigation, reiterated enquiry by the Judge, a careful and deliberate consideration on his part. A decision extending over many points and various relations, and affecting, it may be, numerous parties.

In the note appended to the 11th paragraph the learned Judge states correctly that " the administration of Law and Equity by different Courts " is *peculiar* to England for although a similar distinction existed at " Rome under the terms *Jus Civile* and *Jus Honorarium* these branches " of the *Law* were not administered by different Judges. The Prætor " both gave action which were of the Civil Law and decreed interdicts " and other equitable remedies." The Roman Law, as a science, embraced two subjects, *Rights* and *Actions*. *Rights* were regulated partly by the *Jus Civile* and partly by the *Jus Honorarium* or Prætor's Edicts, which were Laws issued by the Prætor and acquiesced in by the Legislature. In like manner the remedies were of two sorts—the *Actiones* of the ancient Law and the remedies introduced by the Prætor. We know very imperfectly the practical mode in which the Roman Law was administered. How they proceeded with either description of causes,—what was the authority and jurisdiction in the trial of the *Prætor*, and what the power of the *Judices*—in different descriptions of cases we do not accurately know—but we know that the modern nations of Europe who have adopted the Roman Law as settled by Justinian, have with much less practical success than has attended the English method referred both descriptions of causes to the same Tribunal to be tried by the same description of Process, upon Libel and Exceptions. The nations who have adopted the Law settled by Justinian as that to which they give the name of *Lex Cannumis* or the Common Law are, I believe, the Continental nations of Europe and the Scots in matters not feodal. But it is otherwise in England, the direct authority of the Roman Law having ceased in England during the Reign of the Emperor Theodosius the Second—and the English having steadily resisted the introduction of what they called the Roman Law, namely, the Law settled by Justinian,—the unlearned not knowing that their Common Law was already moulded after the *Jus Antiquum* which existed at Rome before the time of Theodosius. The Lawyers of England therefore resisted the introduction of the forms of process handed down by the Common Law, whether accurately copied from those used by the Roman Lawyers cannot be certainly known, but it is probable they at least very much resembled them—and the Churchmen, who were the Civilians, were obliged to pretend to a distinct source of jurisdiction to enable them in a separate Court of their own to deal with cases of those descriptions which they very wisely saw the course of proceeding in the English Courts disabled them from doing complete justice in. The jealousy of the Law Courts, and the confidence reposed in them much to their honor by the Parliament and the People, made it necessary for the new Court of the Chancellor to abstain from pretending to administer the *Law*, and he declared therefore that he

dealt in nothing but what he called *Equity*, which he pretended to distinguish from *Law*—and that his only, or at least chief means of arriving at the truth in these cases was through the conscience of the party whose conduct or whose right was called in question. In his assumption of this which was supposed a limited and extraneous jurisdiction, the Courts of Law with some occasional and partial opposition acquiesed, and it being found as the affairs of society became more complicated that the cases increased with which the Courts of Law could not deal satisfactorily, and which the Chancellor with his more lengthened proceeding and more deliberate investigation could thoroughly unravel and justly decide, he was permitted to monopolise a large description of cases to the great advantage of the Suitors.

If the separation between Courts of Equity and Courts of Law is to be done away with, one of these courses must be resolved on—either, 1st, To abandon the due investigation of complicated transactions, and such as have extended over long spaces of time—or 2dly, To abandon the prompt decision of ordinary and daily transactions, rendering a horse cause as anciently before the Court of Session in Scotland or the Parliament of Paris, a species of suit in Chancery—or 3rdly, A common transaction of bargain and sale, an account extending over several years, a complicated trust by which the affairs of many different persons are required to be administered, and various other matters of difficult enquiry and decision must be all tried in the same manner with a cause in a Court of Requests, by which if justice could be administered between the parties no point of Law can be declared from which any man practising in the Court may be able to advise a future client whether to institute or whether to defend any subsequent suit. Their attachment to *ancient forms* as well as to *ancient principles*, a quality more valuable in Courts of Justice and in the character of a people than some modern Philosophers, who are not aware of the mischiefs of a departure by a free state from the *Mores Majorum* seem willing to allow, led the English Courts of Law to adhere to ancient forms and rules which in some cases prevented the easy and perfect administration of justice. This threw another class of cases into the Court of the Chancellor, not as being in their nature such as to require the protracted investigation to which his mode of proceeding was adapted—but such as demanded a species of redress which the ancient forms of Courts of Law did not enable them to afford. This no doubt was a defect in the structure of those Courts. On the other hand the proceedings in Courts of Equity are with as little doubt capable of some material improvements. The defects in the Courts of Law cause an unnecessary delay and expence in some cases, which but for those defects might be disposed of in the

same manner as other cases which concern the ordinary and simple and daily transactions of life. The want of those improvements in Courts of Equity cause somewhat greater delay and expence than are quite necessary to their duly proceeding in the causes proper to their investigation. It cannot be reasonable upon those accounts to break up and demolish venerable institutions, which have administered justice hitherto in the most civilised, the freeest and the wealthiest nation of Europe, with a degree of accuracy and precision which has never been known in any other country in the world, for the purpose of substituting what is called a natural, but which is, in truth, a rude, untried, and ill-digested proceeding, suited, as it appears to me, only to a state of society little advanced from barbarism. Surely it were wiser to leave the essential distinction between what is called Equitable Jurisdiction and Legal Jurisdiction where it is—to correct defects in the procedure in Equity where it may be done with safety—and to extend the powers and amend the process of Courts of Law, where a deficiency in those respects is the only cause which compels the parties to resort to Equity—the case being in its nature fit to be investigated and decided at Law.

It is a mistake which I must express my surprise that the learned Judge should have fallen into, to assert that "*Sir Lawrence Peel in his "Minute has carried out still further the views of the Law Commission "to abolish the fundamental distinction in English practice between the "administration of Law and Equity.*" Nothing I can affirm with certainty was further from the intention with which that Minute was framed by Sir Lawrence Peel, and acquiesed in by Sir Henry Seton and myself, and I cannot avoid saying that the Minute distinctly and unequivocally declares our opinion that that fundamental distinction ought not to be and cannot safely be abolished.

The suggestions of that Minute with regard to improvements in the administration of the Law are confined to the following heads:

1. That the substance of the system of special pleading is well calculated for a Court constituted like the Supreme Courts of Judicature on their Plea Sides, but that many of its technicalities of after-growth are not necessary to be retained.

2. That an Equity suit aims at too much in aiming at settling all the rights between all the parties interested to any extent in the subject matter of the litigation, and that in Courts constituted like the Supreme Courts of India, much may be done in the simplification and improvement of a system of Equity which it has not hitherto been found practicable to effect in England.

3. That some causes which are now confined to the Ecclesiastical or Admirally Sides of the Courts might with advantage be transferred to the Plea Side.

4. That that part of the jurisdiction of Equity which arises from defects of the Common Law may be done away with by enlarging the powers of the Court on its Plea Side and remedying some defects of the Common Law, and thus expence and delay be saved to the Suitors.

Lastly. It is stated that a large portion of matters will still remain subject to equitable jurisdiction and suggestions are offered for simplifying in some respects the practice in Equity.

How it should be supposed that a Minute expressing these objects and confined to them should either be intended to carry out, or should in fact carry out views of abolishing in the Supreme Courts in India the distinction in English practice, between the administration of Common Law and Equity I know not—I do not complain of a misrepresentation which I know to have originated in mistake—but it is necessary I should protest against it because it is directly opposed to the opinion I have entertained since I first became acquainted early in my professional life with the essential distinction between the results of the mode in which civil justice is administered in England by separate Courts of Law and Equity, and in Scotland by one Court exercising a mixed jurisdiction administering both.

I practised as a young man in the Court of Session before I was called to the English Bar, and after several years attendance on the Court of King's Bench and on the Northern Circuit finding that my private affairs required a longer residence during the year in Scotland than was consistent with the professional life of an English Lawyer, I again returned to the Scots Bar. And during all the time I had not infrequent opportunities of meeting some of the greatest Lawyers of their time at the Bar of the House of Lords upon cases appealed from the Court of Session. My own opinion was confirmed by theirs—that the excessive length of the written and printed pleadings and arguments in that Court—the consequent expence and delay of the Proceedings—the indistinctness with which principles of Law were frequently applied to the facts elicited—the difficulty of finding fixed and naked Rules of Law established or admitted—the frequent and not seldom the wide differences of opinion among the Judges—were all to be attributed in great measure to the mixture of the jurisdiction of a Court having to deal with complicated transactions extending over a great length of time —involving the unravelling and adjusting long and intricate accounts

or arising out of trust and confidence—to all which cases justice requires that rules of investigation and decision shall be applied, suited to the particular nature and required by the particular difficulties of the case with a jurisdiction having only to deal with transactions of Bargain and Sale—Letting and Hiring—Borrowing and Lending, and other ordinary contracts and liabilities, the facts of which are thoroughly investigated at a sitting, and the rule of Law applicable to them generally pronounced at once without any doubt or hesitation, or if any such doubt arises the question of Law being fully discussed in one argument by Counsel and settled by a short deliberation of the Judges in their closets. The habits of mind generated by the one and the other of these Judicial occupations are extremely different, and the occupations being confounded it is found that the habits of minds, not of unusual perspicacity, become so too, neither exhibiting the promptness and certainty required by the one jurisdiction, nor the patience and deliberation required by the other. But a still more material evil was seen to exist in the proceedings of the Court of Session, namely, that this mixture of jurisdiction rendered the process the same in cases essentially differing in their nature and requiring methods of investigation wholly different. There seems to be in the provisions and practice of the Law of Scotland relative to *actions*, no other defect than this that whatever be the nature of the right in question or of the investigation which its ascertainment demands, the *mode of proceeding* must be the same—all actions, with the exception of a few summary actions in some special cases requiring the immediate interposition of a Judge or Magistrate, and some five or six *Brieves of Inquest* issuing from Chancery—being *actions by Summons* which, whether they be *petitory actions* whose object is to establish and enforce a right, of what nature soever it may be known to the Law—or *Possessory* for the restoration of the lost possession of Lands or Moveables—or *Declaratory* for the finding and declaring the existence or non-existence of a lawful right of what nature soever without any petitory or possessory conclusion, must all be brought before the Court by a *Summons*—in which the plaintiff, there called the Pursuer, sets forth, not in technical language, the nature extent or grounds of his complaint or cause of action, and the conclusions which by Law he is entitled to deduce—accompanied by a citation to his adversary to appear.

To this Summons the defendant puts in *Defences* in which he states his whole defences. Dilatory, if he has any, and *Peremptory* which go to the merits of the case either denying the facts stated in the Summons, or relying on other facts which he avers will countervail them or alleging considerations of *bona* or *mala fides*—or arising *ex æquo et bono* which

ought to have the same effect, or stating at one and the same time, and in one and the same paper forming part of the record several or all of these defences. It being uncertain what aspect the cause would assume little care was taken by the Court or the Counsel in the times of which I speak to restrain the Summons and Defences within the limits of strictness and correctness of averment or denial, provided the language was intelligible to what Lord Coke would call a *common intent.* And the parties were left to adjust the precise enunciation of the points truly contested in future stages of the cause—(Bell's Principles of the Law of Scotland.) It has been the object of the Legislature since those times to correct much of this inaccuracy—but a great deal of it will not fail to strike an English Lawyer as necessarily arising from a want of separation between Judicatures so different in their nature—and the procedure adapted to one of which must of necessity be so ill adapted to the other that an attempt to combine them in one can only defeat their usefulness. That it did so in Scotland, I apprehend to be quite certain, and I think I may say that this was the opinion of Sir Samuel Romilly and Lord Eldon.

The evil of having the same Judges to decide causes of Law and of Equity I consider one of no small magnitude—but this without entire remodelling of the constitution of the Court by the Charter and an addition probably to the number of the Judges cannot be remedied. But at least we have at present different machinery for carrying out the two jurisdictions which avoids the greater evil of the two, and I cannot see why we should relinquish the advantage which we have.

I think no man can read the Plaidoyer of a French Advocate without perceiving that the same evil existed in France arising from the same cause.

In paragraph 12 Sir E. Perry says " that one of Her Majesty's " Supreme Courts in India constitutes a tribunal to which by an " effort of the mind four or five different characters must be attributed " at every sitting of the Court, and in all of which characters different " rules of Law, different rules of evidence and different modes of seeking " out the truth are recognised as the governing doctrine." Against this as being a description of the Court in which I have the honor to sit, or of the Supreme Court of Bombay while I had the honor of sitting there, I must take leave to protest. I have never been conscious of such an effort of mind as the learned Judge alludes to, and I must protest against the assertion that there are *different rules of Law* on different sides of the Court, unless in the sense of the forms of procedure being part of

the *Law of the Court*—or the nature of the right to be enforced being a *rule of Law.* Most certainly the *rules of Evidence* are the same except that in Ecclesiastical and Admiralty cases as in Treason two witnesses are required—nor are there any different modes of seeking out the truth except that in Equity the defendant must answer on oath. In the next paragraph the learned Judge refers to a communication which he says he had the honor of making to the Law Commission in June 1843 in which he had urged the adoption of a system similar to that proposed by the Law Commission induced thereto by observing on the one hand the extreme expence and delay of the prevailing procedure on the Common Law and Equity sides of the Supreme Court at Bombay, and on the other hand the cheapness and satisfaction to the Suitors with which claims under Rupees 350 were disposed of in the Small Cause Court there by a procedure similar in its nature to the system proposed.

I have not heard that the structure of the Small Cause Court at Bombay has been altered since I had the honor of sitting in it, and I will presently show that few things can be more different one from another than the procedure in that Court in my time from the system, or rather the scheme proposed by the learned Judge and the Law Commission, if these schemes can be considered as the same.

But it is material in the first place to observe that it appears to have been lost sight of here that the object of the institution of Courts of Justice in Civil matters among a civilised people is twofold.—1. To decide the particular questions which may arise between parties who come before the Court.—2nd. To secure so well considered and authoritative a decision upon the point of Law involved in the question as may go a considerable way to settle that point of Law so as to prevent probably twenty future suits involving that point, and such a course of uniform and well considered decisions that four or five consecutive decisions upon the point may prevent the institution of any more suits upon the same point in all time to come. This second object greatly the most important to the community does not appear to have been kept in view by Sir Erskine Perry or the Law Commission, and that which constitutes the evil of the expence necessary to be incurred in order to insure this object, for no expence which is necessary to ensure it can be in itself an evil, is not noticed. This consists in the expence of obtaining a benefit for the publick being thrown upon the litigant, whose individual interest is confined to the decision of his own cause, he having no interest in establishing rules of Law but as one of the publick, by which publick therefore the expence of the whole machinery of the Court necessary to this purpose ought to be borne, leaving to the

Suitor no other expence to defray, but that of obtaing an Advocate and an Attorney to do that for him which he cannot so well do for himself. It is true that an accurate system of pleading renders it necessary for a Suitor to incur this expence. But if this were otherwise the poor and the ignorant can seldom state in the simplest form a plain case with accuracy, and never a complicated one;—and the well instructed and the rich or the busy do not desire to be relieved from this expense since they are much better employed in following their usual occupations than in conducting their suits in Courts of Law when they happen to have any. It being of importance to the publick that the poor as well as the rich should obtain justice, the State ought to provide them with an Advocate and Attorney where necessary. There is an evil no doubt in this, but the power of the Pauper to harass his more wealthy opponent would be greatly lessened by leaving the latter nothing to pay but his Counsel and Attorney.

As to the continuance and improvement of a strictly logical system of pleading and fixed forms of action, I will only say that I think a deviation from this course would find great difficulty in recommending itself to men of forensick experience, considerate judgment and logical minds, and I am sure it would entirely fail in so doing if they had happened to know the effects, the absence of such system and such forms produces where justice nevertheless is administered by able and instructed Judges under an admirable Code of Laws. These effects it has been my fortune to see exemplified in the Court of Session in Scotland—the pleadings upon which the suit commenced being loosely drawn the fact was not separated from the Law nor the distinct fact brought out on which the case was to bear, and I remember nothing better than the complaints this excited on the part both of the Bar and of the Lord Chancellor in the House of Lords on appeals from Scotland, and the numerous cases which were necessarily sent back to the Court of Session for re-investigation and revision after all the expence of a long litigation in that Court, and an appeal to the House of Lords had been incurred. It at length attracted the attention of Parliament, and Lord Grenville applying himself to the question under the advice and with the assistance of all the ablest Scots Lawyers and some of the ablest English Lawyers of the day, it was agreed that the remedy lay in the providing a separate tribunal for the ascertainment of the facts in ordinary cases where the facts were disputed, which tribunal having no power to decide any question of Law must of necessity separate the one from the other and introduce a system of correct and precise averment. Struggling against much opposition from those who, like the learned Judge and the Law Commission, saw nothing in compulsory precision but difficult technica-

lities, Lord Grenville's Bill for the reintroduction of Jury Trial in Civil causes into Scotland after its disuse for centuries, at first experimentally, for a limited number of years, became a Law. Before its time expired its benefits were universally acknowledged and it was incorporated with some improvements into the body of the Scottish Law. I was well acquainted with every step taken in reference to this measure and know that the matter most constantly present to the minds of its promoters was the admirable effects of the system of pleading in the Law of England, and the evils attending the want of at least a system resembling it in its essential characters in the Law of Scotland. To create this at once by Leglislative Enactment was felt to be impossible, but as much was done as could be done to insure the correct framing of Issues to be sent to the Jury. At length the Act 6, Geo. IV. C. 120 was passed with the view of compelling a clear and precise averment of the facts and of the Law relied on—an early production of the written evidence and compelling the written pleadings composing the Record to exhaust the matter which forms the case of the plaintiff and the case of the defendant both in fact and in Law—to assume in substance if not a logical form the principle of strictly logical and analytical reasoning, and to close the Record so made up before the cause is set down for trial by the Jury if upon the fact or by the Court if upon the Law—it being the duty of a Judge by the Statute to examine the pleadings which have been put in by the parties "to see that the cause is fully pleaded and the pleas necessary to exhaust it duly stated and to require the parties to add what is defective before closing the Record." So sensible were the framers of these Acts and the Parliaments which passed them of the importance of establishing and preserving a marked distinction between the modes of investigation necessary in what we in English Courts call Equity causes and Common Law causes, that while the Court of Session is empowered in the first description of cases to send down such issues to be tried by Jury as it may think desirable to have so tried, all cases sounding in damages are directed to be remitted at once to be tried by Jury (6 Geo. IV. C. 120, S. 28, 1 Gul. IV. C. 69, S. 2.)

If any one takes the trouble to read the above Statute 6 Geo. IV. and Mr. Bell's short exposition of the improved system of Scots Pleading under it in his admirable little work entitled "Principles of the Law of Scotland," above cited under the head "Principles of Pleading," 4th Ed. p. 639, I think he will come with certainty to these conclusions. 1. That all the men of science and legal practice who took part in that measure were agreed as to accuracy in Pleading and a distinct separation of questions of fact from questions of Law being essential to

the administration of justice in all matters brought under the cognizance of a Court of Law. 2. That the English system of Pleading is greatly preferable to the improved system of Scottish Pleading, notwithstanding what Mr. Bell says in favor of the latter, since it require no interposition of the Judge till the hearing of the cause unless some interlocutory matter should arise. 3. That nothing can be more visionary than to suppose that the statements necessary to be put on the Record in order to the decision having any certainty and effecting a final settlement of the dispute can be made either orally or in writing by illiterate men or by educated men whose minds have not been trained to the application of logick to legal investigations.

" Although the analysis," says Mr. Bell, furnishes the *principle* the " *mode* of Pleading (in the Court of Session) is far removed from any " logical form and skilful Pleaders while they keep the analysis in their " minds as furnishing the criterion of perfect and exhaustive Pleading " have in practice to cast their Pleading into the shape of Condescendance " (articulate statements of facts) and *pleas*—It is to be observed how- " ever that the art of drawing a Condescendance and Pleas depends on a " perfect understanding of the exhaustive process of reasoning by which " the debateable ground of a cause is completely gone over." Is it thought that all this which is essential to the statement of a cause in order to a just complete decision can be done by parties not bred to the study of Logick and of Law? Yet is there nothing technical in a Scots Condescendance and Pleas—I cannot listen without great doubt and hesitation to reasoning not based on experience, and the evidence of facts with the view of overturning a system which has had the approving experience of centuries adorned by the most illustrious men who have ever existed—nor consent to experiments on the recommendation of speculative reasoners where whatever benefit is prophecied it cannot be denied that failure will throw into inextricable confusion all that most dearly concerns the comfort and happiness of mankind in the transactions of life. The learned Judge does the Judges of this Court the honor to free them from the report of reluctance to aid the cause of *Law Reform*, and I hope that I for one cannot be reproached justly with being an enemy to any description of legal, political or social *Reform*. But pulling down one structure and building another is not, I think, to *reform* which in my apprehension means an adherance to the old plan of the structure taking away what has been incongruously added, replacing what has fallen into decay, strengthening what requires it, and suiting to modern convenience such parts as may admit of slight alterations without disturbing the general character of the Edifice.

I have said above that few things can be more different one from another than the procedure in the Small Cause Court at Bombay in my time was from the scheme proposed by Sir Erskine Perry. That scheme he explains to be based on the following three *articles :*

1. Viva Voce Examination of Witnesses as the general rule. To this I see no objection—if under the exception of a considerable number of enquiries in Equity which may be as well if not better conducted in the Examiner's Office without occupying the time of the Court which may be better employed.

2. Examination of parties to the suit. To this also I see no objection under certain limitations and restrictions.

3. Appearance of parties before the Judge in the first instance, and oral pleadings under the authority of the Court.

To this I do certainly see the strongest objections, and it is so far from being similar to the procedure in the Small Cause Court at Bombay unless its principle be altogether altered, that it is directly opposed to it. Then the party desiring to institute a suit went to the Clerk of the Court, then an intelligent Attorney and a clever man, and stated to him what it was to be complained of. The Clerk questioned him and learnt his case as if he had been his private Attorney. He then learned the names of his witnesses, and gave him Subpœnas to serve on them, and also cited the defendant to appear in the first instance before him the Clerk. He then proceeded to learn from him in like manner what he had to say in his defence and the names of his witnesses for whom he also delivered Subpœnas. The Clerk having thus made himself master of the case of both parties stated in Court first for the plaintiff his case and called and examined his witnesses. After which he stated the case of defendant and examined his witnesses, taking the utmost care in my time that both cases should be fully and fairly before the Court and frequently, after having stated the plaintiff's case most energetically, evincing great zeal and ingenuity on the part of the defendant to refute the arguments he had used for the plaintiff, sometimes to the great amusement of the bystanders. The cases being all simple and the proceedings summary the pleadings were simple also—but the rules of Law were strictly adhered to in the evidence received and in the decision. In this way justice was cheaply, and I think as well administered as the reliance to be placed upon the testimony of the witnesses admitted. But all this while the Judge never saw the parties or heard of the subject or nature of the dispute till they appeared before him for the

trial and decision of the cause. There was no practical objection to this procedure except that the decisions could settle no point of Law, and the questions were of such a nature as seldom if ever to raise points of Law. In my time it worked admirably.

But what resemblance has this to a procedure where the Judge who is to decide the cause is to have the parties before him in the first instance not as Judge but as their mutual legal adviser hearing their statements first from one, I presume the plaintiff, and advising or rather directing him how to proceed and how to frame his plaint, or rather his complaint as I suppose it is all to be oral, and what witnesses he ought to Subpœna, then from the other advising him in like manner how to prepare his defence and how to state it, correcting the logical errors if logic is to be admitted, into which in his ignorance he may have fallen and what witnesses to Subpœna in support of it, nor can it be of much importance whether the Judge hears the parties separately or both together, except for the altercation which he will have to witness in the latter case. But the Judge is to do more as I understand, and I think he must of necessity do more, as his advice will be taken as a command, or at least such an intimation of Judicial opinion as it would require uncommon hardihood to oppose by instituting or defending a suit in opposition to the advice either given or insinuated. The Judge therefore is in truth to determine whether the plaintiff shall proceed with his action or be permitted to come before the Court at all, or the defendant to propound any defence, and if they feel their way so as to induce a belief that they may proceed without great imprudence, the Judge is to control their proceedings in the case which he is afterwards on the proceedings so instituted to decide, and this course is not to be confined to simple and ordinary matters but to causes of all descriptions—how complicate and how intricate soever, in the facts to be unravelled, without any provision for placing upon a Record the precise facts in dispute to be proved—the precise answers to them—or the precise questions of Law to be decided. It cannot be presumed that it is meant that no such precise averments are to be made and recorded. But the whole method and process of working out these matters are to be left to the science and perspicacity of the Judge who has no materials with which to proceed in working out these problems, but the necessarily confused indistinct, probably scarcely intelligible oral narrations of illiterate men in most cases, of men incapable of reasoning accurately in almost all.

Independantly of the undue bias which must in many cases be induced upon the mind of the Judge before he tries the cause and will

be imputed to him in all cases, I apprehend that to state any but the simplest case of Common Law under such circumstances intelligibly would be difficult accurately, to a clear and final result impossible, even to Lord Kenyon or Lord Eldon if they were alive.

I have the honor to be,
Honorable Sirs,
Your most obedient and humble Servant,

J. P. GRANT.

Printed at the Bengal Military Orphan Press

TO THE RIGHT HON'BLE THE GOVERNOR GENERAL IN COUNCIL, &c. &c. &c.

HON'BLE SIR,

The Government of Bombay informed me, in October last, that the Government of India requested to have the opinions of the Judges of the Supreme Court at Bombay, respecting the Report of the Law Commissioners, dated the 15th of February 1844.

Shortly after I had began to write upon the subject interruptions arose from private matters, and immediately afterwards a Term and a Session occurred so that I was unable to conclude writing the observations, I have now the honour to transmit, until the middle of December, since which period much time has been lost through the dilatoriness of the Purvoe employed to copy what I had written.

I have the honor to be,

Hon'ble Sir,

Your most obedient Servant,

H. ROPER.

Bombay, January 10th, 1845.

As the Judges have been requested to give opinions on the Report of the Law Commissioners, dated the 15th of February 1844, it is scarcely open to me to say that my opinion is expressed in my letter of the 4th of August of the previous year, which, as forming part of the Supplement to the Report, has already been submitted to the Government of India. That letter commented on Sir Erskine Perry's suggestions for changing the mode of administering justice, and therefore has reference to the Report in which similar plans and opinions are proposed and advocated. When the letter was being written I had no reason to suppose there was any such unanimity between Sir Erskine Perry and the Members of the Law Commission, and it appeared to me that the Commissioners had not invited any discussion of the subject. I therefore limited myself to a few general observations, and when afterwards aware that Sir Erskine Perry's Minute had been favourably entertained, I was glad to find the Judges at Calcutta had convassed it more fully, and it might be sufficient for me to say that, with some slight qualification, I concur in their opinions as expressed in the Minute of Sir Lawrence Peel, dated the 13th of February 1844.

Sir Erskine Perry's Minute and his subsequent letter of the 22nd May are auxiliary to the Report, together with which they have been printed, and they are obviously relied on as supporting or confirming the letter. I shall therefore controvert certain positions in the Minute and letter to which I cannot assent, and some of which have I think a tendency to prevent a dispassionate consideration of the subject; but I shall first point out a minor inaccuracy which cannot affect the general principles contended for. In the 48th paragraph of the Minute it is proposed that by an Act of the Government the interest on unclaimed Estates in the hands of the Ecclesiastical Registrar be applied to the maintenance of the projected Court. An Act of the Government could have no such effect, for in default of legatees, next of kin and creditors, those funds are the property of the Crown. If it were notified, not merely in the London Gazette, which few people read, but also in the principal newspapers of London, Dublin and Edinburgh, that such Estates are still unclaimed, the Crown and other parties entitled might become apprized of their rights, and claimants to the eight lacks in question might speedily appear.

An impartial enquiry into the merits and demerits of the Supreme Courts can hardly be obtained in India, where each of those Courts,

from its establishment, has been viewed with jealousy by local Rulers and Members of the Civil Service of the East India Company, forming the most influential classes of the community. The difficulty is increased when as in the present instance, the discussion is chiefly carried on between Judges of those Courts on the one hand, and upon the other, the Law Commission, consisting, very differently from the original intention of the Legislature, of three Members of the Civil Service and one gentleman whose professional practice had terminated long before his arrival in this country. Further difficulties have arisen from the institution of comparisons between the Supreme Courts and those of the Mofussil to the disadvantage of, and with highly coloured views of the defects of the former; and from a representation that different forms of process for matters of Civil, Criminal, Legal, Equitable, Ecclesiastical or Admiralty cognizance were adopted in the Supreme Courts, because Sir Elijah Impey and the other Judges first appointed to the bench at Calcutta were under temptation "to form a costly "establishment with a number of Offices to which the different codes "of practice were to afford fees, and of which the founders were to have "the patronage." These comparisons and positions if undisputed might be held undisputable, and I shall first apply myself to the imputation upon Sir Elijah Impey and his Colleagues.

I know not whether their respective circumstances exposed the Judges who first sat upon the bench at Calcutta to the alleged temptation, or whether in exercising their patronage those Judges afforded reason to believe that Offices in the Court had been created from unworthy motives. When we consider, however, what has occurred in the United States of America, if we do not see reason to doubt the expediency of administering Law and Equity by the same modes of procedure, we may at least hesitate to ascribe dishonest views to the first Judges of Calcutta, because in their Court Law and Equity and other branches of jurisprudence were kept separate, being administered by different modes of procedure as in England.

Mr. Justice Story says:

"In nearly all the States in which Equity Jurisprudence is recog-"nized, it is administered in the modes and according to the forms "which appertain to it in England; that is, as a branch of jurisprudence "separate and distinct from the remedial justice of Courts of Common "Law. In Pennsylvania it was formerly administered through the "forms, remedies and proceedings of the Common Law, and was thus "mixed up with legal rights and titles in a manner not easily compre-

" hensible elsewhere. This anomaly has been in a considerable degree " removed by some recent Legislative enactments. In some of the States " of the Union distinct Courts of Equity are established; in others, the " powers are exercised concurrently with the Common Law Jurisdiction, " by the same tribunal, being at once a Court of Law and a Court of " Equity, somewhat analogous to the case of the Court of Exchequer in " England. In others, again, no general Equity powers exist; but a " few specified heads of Equity Jurisprudence are confided to the ordi- " nary Courts of Law, and constitute a limited statutable jurisdiction."

In the tribunal above described as analogous to the Court of Exchequer in England, Equity is administered in the same manner as in the Supreme Courts in India. One object of the Report is to have Equity administered, as formerly in Pennsylvania, through the same forms, remedies and proceedings as the Common Law—if not through " the forms, remedies and proceedings of the Common Law." Whether equitable and legal rights and titles might not thus become " mixed up in a manner not easily comprehensible elsewhere"—may be worthy of consideration, especially as Legislative enactments have been required to check such evils in Pennsylvania, inhabited by a shrewd people, fully awake to their own interests, and amongst whom Equity Jurisprudence had no existence till 1790—long after Pennsylvania had ceased to be subject to the British Crown. Indeed it is worthy of remark that in several of the countries now included in the United States, there was no Equity Jurisprudence whilst they continued Colonies of Great Britain, but at present there are few States in which it has not been adopted, and in nearly all the States in which it now exists, it is administered in the like modes and forms as in England, separate and distinct from the justice of Courts of Common Law. And this state of things has been established since the revolution. In Pennsylvania where Equity Jurisprudence was according to the system contended for by the Law Commissioners' legislative remedies for that system have been resorted to. What the evils and remedies were I have at present no means of ascertaining, for I have but one or two books relating to American Law. I find the Equity Jurisprudence of Pennsylvania in question in the case, Sims, Lessee, *versus* Irvine, in the Supreme Court of the United States in the year 1799, and again in Hoblingsworth *versus* Fry in the Circuit Court, Pennsylvania District, in the year 1800. In the last case Mr. Paterson, a Judge of the Supreme Court, said: " There is a strange mixture of legal and equitable powers, in the Courts " of Law of this State. This arises from the want of a distinct forum to " exercise Chancery Jurisdiction, and therefore the Common Law Courts " *equitise* as far as possible." But neither of those cases discloses the nature of the evils alluded to, and I now merely rely on what has

occurred in the United States as ground for doubting whether Sir Elijah Impey and his brother Judges were actuated by sordid views in keeping Law, Equity and other branches of Jurisprudence separate at Calcutta, and administering them by different modes of procedure as in England.

Under the Charter of the Supreme Court at Calcutta it was imperative on Judges to administer justice in its several branches according to modes and forms analogous to those appropriated to them respectively in England. After prescribing the mode of procedure in actions at Law, in general terms, the Charter provided that the Court should be a Court of Equity and administer justice in a summary manner, " as nearly as might be according to the rules and proceedings of the High Court of Chancery." Criminal justice was directed to be administered in such or the like manner and form, or as nearly as the condition and circumstances of the persons and the place would admit of, as Courts of Oyer and Terminer and Gaol Delivery, did or might in England; and with respect to the Ecclesiastical and Admiralty Jurisdictions a slighter conformity to modes of procedure in use in the analogous jurisdictions of England was enjoined. A passage from Sir Elijah Impey's convincing speech at the bar of the House of Commons on the 4th of February 1788, is prefixed to the copy of the Charter inserted in the 1st Volume of the Rules and Orders of the Supreme Court, &c., edited by Mr. Smoult and Mr. Ryan. It thence appears that the draft of the Charter in question had been perused by Lord Thurlow, altered by Lord Loughborough, revised by Lord Walsingham and Lord Bathurst, and commented upon by them all respectively when in office. We may conclude that they approved of the provisions of the Charter, and that the Judges of Calcutta in organizing the Court, could not have disregarded the opinions of such men.

It would be misapprehension to suppose that such evils as are exemplified by the Statement of the case of Poonjia Cawnjee *versus* Abdool Raheem Khan, in Sir Erskine Perry's Minute, Section 18, are of common occurrence under the present system of Equity Jurisprudence at Bombay. The bill was short and might have been answered within less than fifteen weeks, but there may have been overtures for peace in the interim, and it does not appear when the Counsel and Attornies respectively received their instructions. A Purvoe employed to copy the interrogating part of the bill, not seeing the usual words—whether—and how otherwise, in that part by which, in case assets should not be admitted, it was required that an account should be set forth, altogether omitted copying that passage,

and hence the answer was defective in not setting forth an account. Within twelve days after the exception had been taken the further answer was put in. The cause might have been heard in the next term, and without any evidence being taken, for the defendant's answer admitted the complainant's claim, but denied assets. The complainant, however, successively filed two amended bills, each so copious as to require a new engrossment. The object was to extract full accounts independently of proceedings in the Master's Office. Nothwithstanding the authority of White *versus* Williams and Leonard *versus* Leonard, and that class of cases, it appears to me that such a course should be wholly disallowed. There was nothing analogous to it in the old action of account which the Judges at Calcutta now propose to restore, thus impliedly consenting that, to some extent, the system I object to shall be discontinued.

Two years elapsed after filing the rejoinder before the case was brought to a hearing, when a decree for an account was taken *by consent.* The delay, I conceive, could not have occurred had the plaintiff been determined to speed the cause, but he may have been influenced by the following motives to which a Gentleman, who as acting Master in Equity became acquainted with the suit, assured me that much delay in the Master's Office was attributable. The defence was want of assets, and this Gentleman informs me he understood that the complainant, apprehending the defence might be made good if the account were taken immediately, deferred proceeding in order that further assets might be got in, and that interest upon the amount already received might accumulate. There are circumstances consistent with this view of the matter, for when the first answer was filed a large portion of the assets (9051 Rupees) ultimately received, had not been recovered by the Executor. The complainant did not bring the decree into the Master's Office until more than three months after its date, and from that time up to January 1838, a period of nearly two years, only eleven effectual meetings were had before the Master, whereas the complainant might have taken out as many warrants as he pleased. From the 12th of April 1840 to the 10th of February 1841, that is to say, in a period of ten months, there was only one attendance at the Master's Office. Some delay may have arisen from the Gentleman who was Master in 1836 having become insane. Another Gentleman was appointed to act for him till he resumed his Office in, I think 1837, but he soon became ill again, and was obliged to relinquish his appointment.

To me it appears, not only that the case is peculiar, but that the description of it in the Minute is somewhat coloured, for we therein

find a period of above twelve months, which it is said, elapsed between a demand for payment and the filing of the bill, put forth as a portion of the Law's delay. The Minute also is inaccurate as to some of the particulars of the case. It is said—" The plaintiff having a claim against " the Testator of between 2 and 3000 Rupees applied to the defendant " for payment of his debt, and at all events, for an account of the Testa- " tor's assets, but the defendant refused both one and the other. The " plaintiff was therefore forced to file his bill, &c." There was no evidence of any such application for an account of the Testator's assets prior to filing the bill. It is not even alleged in the bill that any such application was made. The complainant's claim was founded on a Bill of Exchange, drawn in his favor upon the Testator. It was stated in the Bill in Equity that the Testator accepted the Bill of Exchange as Security for the drawer, and also, that the Testator paid to the complainant a small portion of what was due upon the acceptance, and that after the Testator's death the defendant had accounted with the drawer, and had been credited in, or had received value for the full amount for which the Testator had become liable by the acceptance. But there is not a word in the Bill of any prior application for an account of the Testator's assets. After alleging, as a pretence on the part of the defendant, his declaration that he had no assets, the usual charge to the contrary is added in these words—" whereas your orator charges the contrary thereof and " so it would appear if the defendant would set forth as he ought, but " which he refuses to do a full, true and particular account, &c." Even this charge was not admitted by the answer, in which the defendant fully admitted the plaintiff's claim and offered to account for the assets.

It is said in the Minute that the answer was excepted to, and on argument a further answer was ordered. The origin of the exception I have already mentioned. There was no argument of the exception. No order for a further answer was made, and within twelve days after the exception was put upon the file the further answer was put in; circumstances tending to show, as the fact was, that the omission has occurred through the oversight of the defendant's Counsel. After nearly three years litigation the complainant took, by consent, the same decree which he might have had upon bill and answer within the first five or six months.

It is said in the Minute : " A long litigation of nearly four years " took place on these points in the Master's Office, when a Report was " presented altogether against the defendant. This Report was excepted " to by the defendant but all his objections were overruled." It should have been added, that owing to an error of the Master, the defendant

was charged with 17,263 Rupees too much. Had that error not occurred the Testator's Estate would have been found indebted to the defendant, whose defence, want of assets, would thus have been established. It was ordered, on further directions, to the effect, that the error should be rectified, and, with a view to costs, I presume, that the Master should inquire and report whether certain property received by the defendant, had been fairly brought to account. The defendant in an account annexed to his answer, and in another account filed in the Master's Office had given credit for considerably less than the just amount, the Master therefore reported that the defendant had not fairly brought to account the property in question. Exceptions were taken but overruled. Finally, it is said in the Minute, " a decree on all points raised by the defendant " was made against him, when a further controversy was raised by him " as to his non-liability to costs on the ground of being an Executor ?*(a)*" —The cause had come on upon the exceptions and for further directions, and the exceptions being overruled, the only points remaining were whether the defendant had made out his defence, want of assets, and who should pay the costs of the suit. The Estate was found indebted to the defendant in 884 Rupees,—so the result of the suit as to the principal point, want of assets, was decidedly in his favour. Still he was ordered to pay to the complainant all the costs of suit, and as he had acted dishonestly in filing false accounts, I think, if the Court had power to do so, it exercised a sound discretion in ordering him to pay the costs. In Robinson *versus* Elliott 1 Russell, the result of the account in the Master's Office was that there were no assets unadministered, but the Executrix was charged with more than she had admitted in her answer, and therefore, although the bill as against her was dismissed, it was dismissed without costs. The case before Sir Erskine Perry was much stronger. In Nicolson *versus* Wordsworth, Lord Eldon intimated that where a bill is dismissed a defendant may be ordered to pay the costs, and see Mortimer *versus* Orchard, before Lord Loughborough and Anon 4 Madd 273. In this country the Courts exercise a very wide discretion in such matters, but I am not aware of any exact precedent for the order in question, and therefore feel no surprise at there having been a controversy as to the liability of the defendant.

In my letter of the 4th August 1843 I expressed opinions that stagnation in the China trade and in mercantile affairs in general had latterly caused litigation to decrease; that such effect was temporary and that there was then nearly as much business in the Court at Bombay as there had been at any time during the ten preceding years. This view was in no

respect refuted by the Schedule of Cases heard and actions tried during the years 1840, 1841, 1842, annexed to Sir Erskine Perry's Minute. In the 4th paragraph of the Minute that Schedule is referred to as showing the amount of business in the Court. In the 6th paragraph it is said that although the number of suits in the Mofussil Courts is annually increasing, those in the Supreme Court decline in a like ratio, and in a note upon the latter statement it is said: " The number of plaints filed on " the Common Law side of the Court have fallen off 20 per cent. during " the last three years as taken on an average of the preceding ten years;" It follows that the Schedule thus adduced as evidence of the small amount of business in the Court, had merely reference to that period in which there had been the least business during the thirteen preceding years; and so far from there having been evidence of an annual decline of business, the Schedule showed that the amount of business in the year 1842 exceeded that of either of the next two preceding years. In fact the Schedule tended to establish my belief that interruption of the China trade had caused a decrease of litigation, and that such effect was merely temporary. The Opium was surrendered in March 1839 and in the Dewallee of that year scarcely any accounts were adjusted. European and Native Merchants exerted themselves to induce creditors in the bazar to show forbearance to their debtors, as was in evidence before the Committee of the House of Commons appointed to enquire into the surrender of the Opium. Hence, in 1840 the first year to which the Schedule referred, there was but little doing; there was but still less in the following year, but towards the end of that year the trade was to some extent resumed, and it became certain that compensation for the Opium would be granted, and accordingly in 1842 Law business considerably increased. It had still further increased when my letter of August 1843 was being written, and it may be concluded that a further improvement has taken place inasmuch as the first three terms of the present year have been insufficient for the transaction of business and sittings after each term have been required.*(a)* My opinion is further confirmed by that of a professional gentleman of considerable experience. He has expressed his belief that the amount of wholesome litigation in the Court at " Bombay has increased rather than diminished," adding that " much business is " now kept out of the Court that in former days probably would have " found its way there." Above four years ago, I understood from Mr. Cochrane, who had been at the Calcutta Bar, that more solid business

(a) During the fourth term, which commenced and concluded after the above passage had been written, there was but very little business, and it was all disposed of in a very few days. This has been chiefly attributed, and, I believe, justly, to the absence of principal Counsel, and to the illness of an Attorney who was in considerable practice. He became unable to transact business shortly before the term began, and died a day or two before the term ended.

was transacted in the Court of Bombay than in that of Calcutta where I believe much time was formerly occupied in disposing of demurrers, exceptions and such like proceedings, which unless founded on some substantial question, and not upon mere points of form, have been, for several years, utterly discountenanced at Bombay. On the whole, I doubt whether at the present period Judges are more occupied at Calcutta than at Bombay, especially as at the latter place three of the Criminal Sessions for the present year have already occupied above fifty-two days, with the exception of Sundays and two or three holydays, and the fourth Session is yet to come. But the Criminal business during the present year has been unusually heavy and one case occupied nine days and another three days.

In my letter of the 4th of August 1843, I said the cost of litigation in the Supreme Courts was very great and ought to be diminished, but the expences incurred on the plea side of the Court at Bombay are, I believe, somewhat incorrectly stated in the 8th and 9th paragraphs of Sir Erskine Perry's Minute, and in the Schedules to which they refer. His estimate is "that a defended cause in the Supreme Court costs the losing "party about 1200 Rupees, that an undefended cause costs about 450, "and that even in causes when the defendant confesses the claim or gives "a cognovit on the first opportunity he has to do so, the expences "amount to no less than 189 Rupees." It appears that the number of cases from which this calculation was made included those cases in which, owing to peculiar circumstances, such as references to arbitration, special motions, &c., extraordinary costs were incurred. This, although the estimate may be correct, as giving in one sense the average amount of costs in each of all the cases forming the mass of the litigation in question, it seems erroneous to intimate, as in the 9th and 22nd Sections of the Minute, that in an ordinary action such expences are incurred. The Taxing Officer has furnished me with tables and calculations upon the subject, founded on examination of the registry of bills of costs in his office for the same three years specified by Sir Erskine Perry. The Officer tells me he has taken "the cases which appear to him to deter-"mine the general and usual costs in defended causes, undefended "causes and cognovits for those several years. Where the costs includ-"ed arbitrations, special motions or matters of exception they are not "inserted, as the costs in such cases are special rather than general."

According to the Taxing Officer's estimate, corroborated by tables which accompany his Statement, the cost of a defended action to the losing party is about 800 Rupees; (Sir Erskine Perry's estimate is

" about 1200 Rupees,") the costs of an undefended action are about 192 Rupees ; (Sir Erskine Perry's estimate is "about 450,") and where a cognovit or confession of the claim is given the average costs have been 147 Rupees ;—(Sir Erskine Perry's estimate is " 189 Rupees.")

The amount of fees to Counsel in the defended cases from which the above estimate was made has also been ascertained, and thence it is stated that on an average, 239 Rupees have been paid to Counsel in a cause, leaving about 561 Rupees for the remuneration of Attornies on both sides and the Officers of the Court.

These costs, in my opinion, are too high, but considering that during the five years including 1839 and 1843, judgments were recovered by plaintiffs in the Supreme Courts in 338 causes, defended and undefended, for the amount in the whole of 1,769,970-2-1½, and that the taxed costs of the plaintiffs in such cases amounted in the whole to 53,890-3-7½, being at the rate of about 3 per cent. upon the sums recovered, I doubt whether there be such disproportion as is intimated in Sir Erskine Perry's Minute, between the cost of suing in the Supreme Court and in the Courts of the East India Company. In the latter, according to the 2d Bombay Regulation of 1827, Section 52, and Appendix L, the fees to a Vakeel for prosecuting or defending a suit are 3 per cent. on the amount sued for, if not more than 2000 Rupees : if the amount exceeds 2000 Rupees and does not exceed 10,000, 3 per cent. on 2000 Rupees of the amount and 2 per cent. on the remainder : in suits for value not exceeding 20,000 Rupees, 3 per cent., or 2000 Rupees of the amount, 2 per cent., or 8000 Rupees of the amount and 1 per cent. on the remainder. Though the fee upon any amount above 20,000 Rupees was formerly half per cent. I believe it is now fixed at 1 per cent. Each party is generally bound by special agreement to pay a much larger per centage to his own Vakeel in the event of his succeeding, sometimes one-fourth—sometimes, it is said, one-half. I have known evidence of such agreements on two or three occasions before the Supreme Court at Bombay. The Stamp Tax on Law proceedings is also very heavy. See Bombay Regulation XVIII. of 1827, Appendix C. D. E. and F.

Suits for small amounts may be conducted at a cheaper rate in the Mofussil Courts than in the Supreme Court, but the larger the value, sought to be recovered in the former tribunals the greater becomes the cost, and in an extravagant ratio, especially as appeals from such Courts so frequently occur. In 1834 or 1835, there was a decree against one Heerachund Bedreechund in the Supreme Court for upwards of 14 lakhs,

and another man is now defendant in a suit in which about 14 lakhs are claimed from him. What enormous sums might be levied from parties to such suits in a Mofussil Court by way of charges for Stamped Paper fees to Vakeels and the share of the Vakeel of the successful party. The Bombay Government being engaged in a suit about a village in Guzerat producing about 12000 Rupees per annum, the case went before the Privy Council. The Government, I understand had to pay 60,000 Rupees as costs, of which perhaps, one-half were costs incurred in this country. I have been furnished with the following case which has recently occurred. Two Hindoo women disputed the right of heirship to a wealthy Shroff. One of them obtained a certificate of heirship, which was confirmed by the Sudder Adawlut. The other filed a suit to annul it and obtain possession of the property. She stated the property in dispute at one lakh. (It is said to be many lakhs) the Stamped Paper for the plaint was therefore 1,000 Rupees. The Assistant Judge dismissed the suit, on the Statements in the plaint, without taking evidence. The costs of both parties were 3,941 Rupees. On appeal the Judge reversed the first decree, without taking any evidence, and merely annulled the certificate of heirship. The costs of both parties in that appeal were 3,186 Rupees. They have a further appeal pending before the Sudder Adawlut, the costs of which will be about 2,480 Rupees to the unsuccessful party, exclusive of fees to her own Vakeel, and irrespective of the private agreement for bonus or per centage upon which the successful party will be liable.

I believe the expensive of suing in the Supreme Court chiefly arises from the cost of Office copies of the pleadings, and fees to the Officers of the Court. If those Officers were paid by the Government, as it is proposed the Officers of the projected Court shall be, or if compensation were given to present holders of Offices, pleadings might be delivered between the parties instead of being filed. They might be handed in at, or shortly before the trial or hearing, and would furnish materials for making up the record. Under such a system the costs of suitors in the Supreme Court would be much less, I believe, than those at present incurred in the Courts of the East India Company.

Of late years much has been done with a view to lessen the expense of pleading in English Courts of Law and Equity, and much more I think might easily be done. In Equity, all formal parts of pleadings should be excluded. Merely the legal effect of written instruments should be setforth. Answers might be confined to traversing the plaintiff's case and stating the defendant's, and no admissions could be required in the answer,—if the plaintiff were allowed to read as admitted what-

ever was not denied. Perhaps the complainant should not be permitted to anticipate the defence in his bill: anomalous pleading and much nicety and repetition would thus be avoided. The introduction of vivâ voce examination of witnesses in Equity, and of both parties as well in Law as in Equity would at once abolish the preparing interrogatories for witnesses, and the interrogating part of the bill. Or if the vivâ voce examination of parties be held inexpedient, they might be examined on interrogatories founded on the bill and answer. If, however, vivâ voce examination were adopted the same precise Statement of matters of evidence at present usual in the bill and answer should be no longer requisite, and thus much benefit might result to the parties: see Hall *versus* Maltby, 6 Price. Cross bills might thus be abolished, and a defendant in Equity might be permitted to ask the Court to declare instruments sued on, fraudulent, and to order them to be cancelled. Several other changes might be suggested.

The expense of litigation probably operates, not progressively, or in causing a gradual or annual decrease of business, as seems to have been supposed, but by prescribing limits proportional to the value of matters in dispute, so as to preclude having recourse to a costly tribunal for what may not be worth heavy charges for a suit. The Supreme Court is a forum unsuitable to small matters which should be disposed of in some such Court as that proposed by the Law Commissioners, more simply and less expensively organized. Courts of the latter description can also, in their manner, decide affairs of greater moment, and whether their jurisdiction should therefore be unlimited appears to be a question arising on the Report. Unless their ability to dispense justice be fully equal to that of a Supreme Court, I conceive their authority should not be extended. No doubt such Courts will be popular, for recourse may be had to them on cheap terms. In general they will be resorted to in the first instance to the exclusion of any more costly tribunal, charges for suing in which will not be incurred unless upon appeal if permitted, from alleged erroneous decisions of less expensive Courts. It is proposed to allow an appeal from the Court of the Law Commissioners, but how greatly is a right prejudiced by an erroneous decision in the first instance. How difficult does it then become to obtain justice by appeal. There is usually a disposition in the Superior Court to uphold the judgment already given which must have considerable effect even when the case is tried de novo, and where credit to any extent is given to the inferior tribunal for accuracy as to facts, how completely may points of Law be swamped by an improper finding. Courts of Appeal are not always, or perhaps often resorted to, where error has occurred, and even when applied to are but

imperfectly corrective. It is therefore important to adopt means for dispensing justice as fully as may be in the first instance, especially considering the many ways in which imperfect administration of Law has pernicious effects upon society. A better description of tribunal may be costly, but the expense should be defrayed by the State or by Suitors. I believe much moral and political mischief results from defective Courts, and that therefore they should have but a limited operation. To a certain extent they have been hitherto necessary evils, for without them claims of small amount would have remained unsettled. If their jurisdiction cannot be restricted to such matters without expense to the State and to the richer classes of Suitors, I still believe it consistent with the interests of the community that the State, or wealthy Suitors should bear the cost of maintaining better Courts for more important affairs, having original, and not merely appellate jurisdiction. Such superior tribunals influence inferior Courts in various ways, and tend to purify them not a little. Into what state would Courts of Requests and Judicatures of that description denegerate in England if the Courts at Westminster were abolished, or what would the Small Cause Court at Bombay in a few years become, if the Supreme Court were not within view of the Judges at that Presidency and the public.

Thus, unless the forum proposed by the Law Commissioners should be better constructed and capable of arriving more nearly than the Supreme Courts at a perfect administration of justice, I think its jurisdiction should be limited to small affairs, and that its being the cheaper Court should be accounted a matter of secondary importance.

But the superiority of such a Court as means of distributing justice seems to be thought sufficiently established by several criterions. It is said in the first place that it would carry off the business from the Supreme Court. I have no doubt, it would for as being the less expensive Court, suitors, even the wealthiest, would resort to it: they would first try their chance there, and only have recourse to a more expensive tribunal if the latter had cognizance of appeals from the former, and an appeal had become necessary or expedient, and thus matters might go on till such evils had resulted from a bad judicial system as rendered a change or remedy indispensable, if measures were taken to enable honest litigants to sue upon the same terms with regard to charges in either Court, the Supreme Court might, and I believe, would be preferred.

The unfitness of Supreme Courts for the destribution of justice is also contended for on the ground that their business gradually decreases,

whilst that of the Mofussil Courts is annually increasing. I have already dwelt on the alleged progressional decrease of buisiness in the former Courts, and, I trust, have shown that it did not exist, and if the business of Mofussil Courts has increased as compared with that of Supreme Courts, it may be that such a state of things has arisen from the comparatively defective administration of justice by the former. Rights will be invaded or withheld under a very imperfect judicature more frequently than where the administration of justice is comparatively equable and certain, and I have long believed that the common notion of Natives of India being more litigious than the rest of the world has arisen because the very imperfect judicial system under the India Company engenders litigation which they who are blind to existing defects ascribe to a peculiar character in the people.

The relative merits of Supreme and Mofussil Courts can scarcely be estimated from the quantities of business transacted in them respectively. Appeals to the Supreme Court from subordinate jurisdictions are almost unheard of, for the latter tribunals are chiefly occupied in small matters not worth the expence of an appeal. In each of the Mofussil Courts, except the lowest, there is much business from appeals—no slight evidence of a defective judicial system.

The leading or principal Natives at Bombay are greatly averse to appearing as litigants, which they seem to consider as a disgrace. During the last September term there was an important case respecting a Ship called the General Wood, which would have been kept back had not an English Merchant consented to appear as sole plaintiff on the record: —several Natives were joint owners but declined to let their names appear. I am not aware that such feelings have much influence in the Mofussil.

Chief Members of the Native Community at Bombay, seek to acquire importance as patrons or protectors, and to this end are much employed in inducing litigants to accept their mediation. Much apprehension of their displeasure is apparently felt, and considerable sacrifices are made to propitiate them. With that view in a recent case a party compromised for a sum of money an indisputable claim to a much larger amount, full payment of which could have been easily enforced.

The Supreme Court gives little encouragement to fraudulent or frivolous suits, a description of business which, I have been told, is rife in the Mofussil, and by the advice of both branches of the profession at the Presidency much litigation is prevented respecting matters which give employment to the Provincial Courts.

Lastly, the Supreme Court only exercises jurisdiction over comparatively important matters, those of minor consequence being disposed of in the Small Cause Court and the Court of Requests. The Zillah Courts entertain the most inconsiderable suits—suits for less than a Rupee.

Under such circumstances it is difficult to draw comparisons founded on the quantities of business which the Courts in question respectively dispose of. I believe there is excessive litigation in the Mofussil Courts, and I attribute the excess to a very faulty judicial system.

Many years ago, on first arriving in this country, I also was told and swallowed much as to the excellence of Provincial Courts, till certain particulars from time to time came to my notice, which somewhat abated previous estimates of their merit. At length, about the year 1832, a case for opinion detailed proceedings in a suit respecting a very simple matter which had been carried through inferior Country Courts into the Sudder Adawlut. In every stage, such errors and improprieties were said to have been committed that I utterly disbelieved the Statement, and in writing my opinion expressed unqualified disbelief accordingly. Some months afterwards a Gentleman in the Civil Service of the Company told me he had read the opinion, and assured me that the case had been truly stated. Such an authority left no room for doubt, and such proceedings, I am confident, could not have occurred unless under a grossly defective judicial system. Prejudice may influence my judgment of such matters, but I rely on the opinion of others, whom I believe impartial, as well as upon my own in professing a belief that the Company's Courts are unequal to the administration of justice, owing to several causes, some of which it may be useful to specify, as similar evils will, I think, affect the Court of the Law Commissioners.

Civil Servants who preside in the Company's Courts have had no professional education or experience. Hence, they imperfectly comprehend rights and wrongs involving nice distinctions, or modified or rendered complex by manifold relations arising from the business of life, and they have no power of ascertaining how, in like cases, legal principles have been previously applied. Unguided by rules of law or evidence they are easily misguided in various ways through prejudice or passion, and being left much in their own power they may allow others to exercise power over them. They become partisans more frequently, and when thus affected are more mischievous than professional Judges, for they are less under control. It often happens that the Serishtadar has great influence with the European Judge of a Pro-

vincial Court, especially as such Judge is generally but imperfectly acquainted with the language in which the proceedings are carried on. I am told he is seldom able to read or write it without difficulty. The proceedings are therefore read to him by the Serishtadar who also records the evidence, and although the Judge may sometimes dictate the *words* of the decree, I understand that is not always or often the case, and the decree is almost uniformly written by the Serishtadar. What power may not that Officer possess; and where the Judge is ignorant, or indolent and confiding, what mischiefs may, or must arise.

Sir Erskine Perry expressed his disapproval of unprofessional Judges in a Minute upon the inexpediency of establishing at Bombay a Small Cause Court similar to one proposed to be erected at Calcutta in the year 1843. The Minute was sent to the Government of Bombay along with a letter I had written on the same subject, dated the 6th January 1844. It appears from the 2nd and 13th Sections of the proposed Act for establishing the new Court recommended by the Law Commissioners, that such Court will be subject to the defect in question, and that all the Commissioners thereof, except the Chief, may be without any legal education. Difficulties in Law may easily escape the observation of an unprofessional Commissioner; and it is not improbable that, in his ignorance, he may make light of them or disregard them, especially as ample scope for self-sufficiency is provided, by leaving it dependant on his opinion of his own ability, whether the suit is to be proceeded with before him or to be transferred to the Chief Commissioner.

On a former occasion I observed that there is no expression of sound public opinion in India where the presence and intervention of professional men are the most effectual if not the only checks upon the errors and infirmities of a Judge. That great benefits otherwise arise from the employment of Counsel is apparent from Sir Erskine Perry's letter to the Government of Bombay. In the 30th paragraph he says: "The "eminent advantage of such (legal) assistance is so obvious that no one "would fail to avail himself of it, when within his reach, if his rights or "possessions became the subject of legal discussion." In the 29th paragraph he says: "It is true, that in such cases (where parties are not "wealthy enough to employ the assistance of Counsel) the Court in the "absence of any forensic advocacy on either side, would often fail in "discovering points material to the issue, points which the parties themselves might be blind to, and the Law delivered would be frequently "inferior in quality to what it would have been after hearing all that "legal acuteness and industry could suggest."

In this country the advantages accruing from the employment of Counsel are peculiar to the Supreme Courts, for although there are Vakeels in the Courts of the East India Company they are ignorant men, of very inferior station in life, and are incapable of instructing or controlling the Judges before whom they practise. They are permitted to contract with their clients for additional rewards or commission in case of success and hence they become seriously interested in the result, and are under temptation to tamper with witnesses and to resort to other fraudulent proceedings.

In the last paragraph of my letter of the 4th of August 1843 I intimated my belief that the establishment of such tribunals as the Law Commissioners recommend would cause the annihilation of the Bar at each Presidency, or that at all events, Counsel would seldom be employed. Sir Lawrence Peel is of opinion that such a consequence would not ensue, at least, at Calcutta, and I have no doubt that if it did not take place at Calcutta it could not at Bombay. Sir Erskine Perry thinks the Projected Courts would open a much wider field for forensic talent and employment. After long consideration I retain my original impressions about the matter for the following reasons.

In the Small Cause Court at Bombay, so much referred to for its supposed similitude to the Court of the Law Commissioners, Counsel are but little employed. Sir Erskine Perry says: "The eminent advan-
"tage of legal assistance is so obvious that no one would fail to avail
"himself of it, when within his reach, if his rights or possessions became
"the subject of legal discussion." My experience of the Small Cause Court leads me to a different conclusion. The dealings of many litigants therein prove them to be men of substance, and some money dealers who often resort to it are personally known to me, and I have no doubt they are wealthy, and yet Counsel are seldom employed in that Court, and very seldom indeed by those who, from frequent experience, may have acquired greater skill in the conduct of their suits. The Clerk or Officer of the Court, if applied to, becomes Agent and legal adviser to both parties, pretty much as the Judges of the Court of the Law Commissioners are to act. But although the Agency of Attornies is thus dispensed with, it often happens that a party, distrusting the Officer of the Court, and reluctant to confide in one who is the confidant of the other party, employs a Native Lawyer to manage his case, and it is chiefly where Native Lawyers thus conduct the business that Counsel are retained for the trial. The chief reason for thus resorting to professional assistance may be, that although the Officer of the Court nominally prepares the brief, the Native Lawyer often adds observations or the names of witnesses, and probably

extracts some additional fees for himself. This alone may induce the Native Lawyer to advise his client to retain a Barrister, for when we find that Counsel are not much employed by suitors of skill and experience, it may be doubted whether the services of Counsel are so beneficial in the Small Cause Court as in tribunals differently constituted; and the retaining of Counsel in the Small Cause Court seems but little dependant on the difficulty or simplicity of the case. In causes of some difficulty even between wealthy parties, Barristers are not usually employed, whilst they are sometimes retained for the trial of very simple matters. Generally, when Counsel appears, the case, however simple, lasts much longer than it would otherwise, and cannot be so summarily disposed of.

Sir Erskine Perry says in a note to the 30th paragraph of his letter to the Government of Bombay: "The elicitation of truth amidst con- "flicting statements, the clear exposition of principles from circum- "stances immersed in matter, and the logical reasoning required to 'bring these principles within the rules of the Law, are operations so "immeasurably better conducted by men trained in legal science and "controversy at the Bar, than by the common herd of mankind, that it "seems to me clear their services can never be dispensed with." To me, on the other hand, it seems clear their services will be dispensed with whenever they can be dispensed with, and that they can be dispensed with in such a Court as that recommended by the Law Commissioners and in the Small Cause Court at Bombay. The fact that in the latter Court they are to a very great extent dispensed with in some degree establishes the proposition.

Professional aid is costly, and although the abovementioned advantages arise from it, and therefore great benefit to society, yet the expence falls directly upon suitors and will not be incurred if success can be obtained without it. The Court of the Law Commissioners, will be, like the Small Cause Court, so constructed, that although Barristers may practice therein their assistance may yet be dispensed with, and when employed by one party only may sometimes tend to the prejudice of the client, owing to the infirmities of the Judge. I believe it is essential to the advancement of justice that both parties be represented by Counsel, and that will not always, or perhaps often be the case, where practically as in the Small Cause Court, the employment of professional aid is optional, and the retaining a Barrister on one side does not render it necessary or expedient that the other party should appear by Counsel also. In such a tribunal where neither litigant is assisted by Counsel, the Judge endeavours to decide impartially, and his efforts may be successful, although, as Sir Erskine Perry observes, he may often fail in

discovering points material to the issue, and the Law delivered may frequently be inferior in quality to what it would have been after hearing all that legal acuteness and industry could suggest. If Counsel appear for one only of the parties the Judge may fail in his efforts to be impartial for it lies upon him to be legal adviser on the other side ; it depends on him alone to combat fallacies and sophistries advanced by the Barrister, his competitor ; his feelings may, and I believe, often do become interested to the injury of his judgment ; a leaning to the side he advocates is engendered, and he may unconsciously become a partisan. Perhaps these considerations have weight with the experienced suitor in the Small Cause Court. If he and his opponent be alike without professional aid, they are so far on equal terms. Should his adversary alone have Counsel he may think the Judge may therefore lean towards himself ; and on his part, he may be reluctant to be the only one to retain a Barrister lest the Court should contract a leaning to the side unprovided with such support. In Criminal trials if there be no Counsel for the prosecution I think a culprit has less chance of escaping, when defended by Counsel than if he be without such assistance, unless there be some point of Law decidedly in his favour which might escape the notice of the Court, or unless there be a good defence to be substantiated by witnesses, for examining whom professional skill may be important. I have reason to believe that persons under Criminal charges have sometimes been advised to the like effect.

The grounds on which I thus account for the services of Counsel being to a great extent dispensed with in the Small Cause Court at Bombay, will equally affect the Court of the Law Commissioners, in which I therefore think professional aid will be very seldom resorted to, although it is probable that Native Lawyers and other low practitioners, like Vakeels in the Provincial Courts, will often be secretly consulted. Indeed the 18th Section of the proposed Act for establishing the Court, should it become Law, will in itself go far to exclude Counsel from practising. A power in the Judge to declare whether the assistance of a Lawyer was reasonably required or not, I have no doubt would often be capriciously exercised, according as piques or partialities arising from the deportment of Counsel and various other causes might influence the Judge's mind. Besides, the unprofessional Commissioners will be in a great degree incompetent to form opinions on the subject, and it is not improbable that Barristers may refuse to practice before them. But little utility or satisfaction can arise from discussing points of Law with men wholly ignorant of the science.

If the services of professional men be virtually excluded, the evils pointed out by Sir Erskine Perry must arise, and Judges will often fail

in discovering points material to the issue, and the Law delivered will be frequently inferior in quality. If the Court of the Law Commissioners should be defective in such important particulars, and if it should become, as is intended, and I doubt not will be the case, the only Court at each Presidency, must it not prove highly detrimental to the prosperity and morals of society.

Other defects in the Provincial Courts arise from the mode of pleading therein. In the 4th Bombay Regulation of 1827 rules for pleading are prescribed. They are so general that under them a very good system might be pursued, but the pleaders and the Judges in those Courts are unprofessional, and, perhaps very properly under such circumstances, there are no provisions for enforcing conformity to the rules, which in practice are but little attended to. I have now before me some specimens of the pleading which in fact occurs. They are prolix, inconclusive, impertinent, argumentative, declamatory and discursive. Hence not only are they more protracted than pleadings in the Supreme Court, at least on the plea side thereof, but departures in pleading are frequent; the grounds of suit and of defence are shifted; immaterial issues arise, and matters really important are overlooked. Moreover, it frequently becomes difficult to ascertain whether any and what issues have arisen, or whether any and what evidence is required—problems which, under the 23d Section of the Regulation, the Judges of the Courts in question have to solve, and to that end are obliged to consult and have intercourse and interviews with the parties whereby prejudices and prepossessions are engendered. So far as pleadings in the Court projected by the Law Commissioners shall be prepared by unprofessional men, I have no doubt the evils alluded to as occasioned by ignorant pleaders will arise; and since the pleaders, whether professional or unprofessional are also to be the Judges, and further, are to act as legal advisers to the parties, I am confident they will very often become partisans, arbitrary and unjust—especially as in a short time there will be no other tribunal in view to control or afford a better example, and as Counsel, if my opinion be correct, will seldom or never practise in the Court of the Law Commissioners.

It is said that pleading or special pleading, is inapplicable to India, because " it is almost impossible that a race of men like special pleaders " should flourish in this country, and from the remarks of Sir L. Peel, " Sir Erskine Perry gathers that the statute of beaupleader is as much a " dead letter at Calcutta as it is at Bombay." During my experience of nearly sixteen years at the latter Presidency, I have seen several Barristers whose reasoning powers were well developed, and who I believe are

and were (for some are dead) not incompetent as pleaders. Pleaders go wrong occasionally in England—more frequently in India, but in the latter country they are pretty much on a par as to the science with the Judges before whom they practise. Consummate skill, however, is by no means essential either to the Bench or Bar, and it is obvious that pleaders, however imperfect, are more likely to attain the ends of pleading by aiming at a perfect system, than by avowedly adopting one which is inaccurate and incomplete or by disregarding the rules of pleading altogether. A great deal of what is complained of as technicality in pleading is founded on analysis of the intellectual faculty, and is in conformity with, and in futherance of the operations of logical minds occupied in determining a dispute. There was a time when through excessive strictness the end was often sacrified to the means—justice to a blind adherence to certain rules prescribed for its attainment, but by due relaxation of which their object is frequently secured. Accuracy should be required to a salutary extent or the rules of pleading as in the Provincial Courts, will soon be disregarded, and it is very difficult to ascertain the medium between over indulgence and being extreme to mark what is done amiss.

If a just remission of rules and due indulgence as to amendments be truly and uniformly aimed at by the Courts the whole system will be progressively ameliorated, and the mischiefs of occasional or frequent error will be greatly remedied. Sir Erskine Perry commends the practice in the Small Cause Court of referring all technical errors in the pleadings to the jeofail of the clerk. Such a practice may be safely carried to an unlimited extent in that Court where the Officer acts as agent to both parties:—under such a system it seems impossible that a technical error can mislead either party. In the Supreme Courts it might be a rule that, at the trial, no pleading shall be held invalid on account of verbal or technical error, that the Court shall decide what is verbal or technical error; that all mistakes which shall not have misled the opposite party shall be deemed merely technical or verbal, and that where such mistakes have occurred the pleadings shall be construed and altered according to the meaning of the parties.

For a long period as already mentioned, demurrers for matters of form have been discountenanced in the Court at Bombay and are therefore very rare, but previous to the trial, certain errors in pleading may be objected to which, with a view to enforce due attention and skill in pleaders, ought not to be excused, for instance, errors which preclude the opposite party from logically taking issue. Such defects may be con-

sidered by some persons as merely technical or verbal, but they are substantial and not merely formal.

The Court at Bombay has exercised such powers with respect to amendments, &c., as are conferred on Courts of Record and Judges at nisi prius in England by the 3 & 4, W. IV. C. 42. SS. 23, 24. In this the profession appeared to acquiesce, and perhaps the authority might be assumed, or the like ends obtained under the Clauses in the Charter directing the Court to give judgment according to justice and right.

The Law Commissioners object chiefly, or solely, to the mode in which neglect of the rules of pleading is visited upon suitors and the consequent mischief. They allege that this can only be remedied by what they term oral pleading, but which in fact is written pleading, prepared by the Judges or Commissioners of the Court. Sir Erskine Perry, on the contrary, proposes to abolish pleading altogether. What he terms oral pleading consists in the story of each party being told orally, and if there be no consequent reduction to writing, there is in fact nothing that a logician can call pleading, especially if every suitor is to tell his own story, without professional aid. He obviously advocates the total abolition of pleading because in the 22d Section of his Minute, he repudiates an essential quality of every system of pleading, the separation of the law and fact, and in the 28th paragraph he even denounces the petition and answer system of which he says: "This "mode of procedure contains within itself all the inherent defects of "Special and Equity pleading. The suitor's story is not told by him-"self, but by his legal adviser."—In the previous sentences he had said, the petition and answer system "has uniformity and simplicity to "recommend it. Any one can draw a petition. No inveterate forms "oppose themselves as obstacles to prevent the Judge from finding his "way to the fact in the case."—He cannot mean to intimate that although a petition be uniform, simple and free from inveterate forms, so that "any one can draw a petition," it necessarily contains within itself all the inherent defects of Special and Equity pleading, or that the story told in a petition is necessarily told, not by the party himself, but by his legal adviser. This 28th paragraph in fact imports that a party himself, and not his legal adviser, should tell his story to the Court; and that a party is not even to employ the simple uniform petition, which any one can draw, as a vehicle for his story, but should tell it orally, himself, without using any written pleading whatever. The note upon the 21st paragraph of his letter to the Government of Bombay, it appears to me, confirms this construction. He therein concedes to the Law Commissioners "the use they propose to make of certain rules of special pleading which

" have been found effective in practice," and subsequeutly adds, " I " conceive however that if written pleadings are abolished and with them " the greater part of the technicalities with which written pleadings " are accompanied, it is a misnomer to apply the designation of special " pleading to a new system in which only a few of it's rules are adopted." Thus, he contemplates the abolition of written pleadings, and five minutes reflection will convince many a man that if written pleadings be abolished no logical pleading can easily be carried on : In fact Sir Erskine Perry intends there shall be no pleading whatever beyond the telling of his story by each party, for there is nothing in the Minute to import, that according to his plan, any thing further is to take place, although we may conclude the Judge or Officer is to be at liberty to make notes.

The Law Commissioners, on the other hand, propose a widely different system, for they intended, that from the oral pleading of the parties, or other agents, written pleadings shall be framed, not by professional adviser, indeed but by the Commissioner or Judge. Nor do they intend, as Sir Erskine Perry assumes, to use certain only of the rules of pleading, for in their Report they say : " In the Supreme Court " there are the elaborate rules of English pleading, calculated for the " most part, as we believe ; to produce the best results, when they are " observed ;" and further on they say : " The logical rules which " constitute the essence of pleading are of universal application," and using the words of Mr. Sergeant Stephen, they term special pleading " a fine juridical invention," and they object to the oral pleading in the Court of Requests as not being subjected to any rules, whilst the rules they prescribe in their Draft Act, Section XII. for pleading in the intended Court might embrace an elaborate system. That they intend a pleading much more special than Sir Erskine Perry advocates is apparent from their precepts to separate law and fact ; that pleas be kept distinct from demurrers, and that no plea be double or argumentative, &c. There are no provisions however for enforcing adherence to the rules, which I have therefore no doubt would soon become, like rules for pleading in the Provincial Courts, mere dead letter. Through want of skill and experience the unprofessional Commissioners would be incompetent to carry out the system, and through want of responsibility and consequent inattention, the professional Commissioners would soon become almost equally inefficient, and therefore, even as matters stand, I have no doubt that pleadings at Law, in the Supreme Courts, are more concise and sufficient than pleadings would be under the system of the Law Commissioners.

In the 11th paragraph of his Minute, Sir Erskine Perry expresses himself to the effect that, " so far as his experience goes, the immense expenditure which attends a trial in the full Court is not rewarded by bringing the case to be tried a whit more satisfactorily before the Judges" than it would be brought before them in the Small Cause Court. I have already said that Barristers are seldom employed in the Small Cause Court, but by the passage above quoted Sir Erskine Perry does not mean that no benefit results from the attendance of Counsel at a trial—such a construction would be irreconcileable with the opinions subsequently given in his letter to the Government of Bombay as to the advantages accruing to Judges and suitors from professional services. He intimates, I conceive, that the written forms adopted for bringing a case to trial in the Small Cause Court are as effectual and satisfactory as the mode of pleading in use in the Supreme Court. I concur in that position so far as the jurisdiction of the Small Cause Court and the forms of declaration used therein are concerned; but thus far, there is little difference between the latter Court and the Supreme Court. The process of the Small Cause Court is confined to actions for debts and liquidated damages in which the cause of action does not exceed 350 Rupees. A very simple form of declaration is prescribed, which in itself affords but little information as to the nature of the claim preferred, a knowledge of which is acquired by the Judge, and perhaps by the defendant, from statements made by the Officer, and from the bill of particulars which accompanies the declaration. Thus there is little that can be called pleading on the part of the plaintiff in that Court, especially where the claim is founded on an indebitatus assumpsit, and the like observations may be made as to similar actions in the Supreme Court, for the money counts are as simple and as brief as the counts adopted in the Small Cause Court, and in themselves, afford as little information as to the ground of action. The same also may be said of other forms of declaration used in the Supreme Court. What can be more general or vague than a declaration in trover or ejectment! what particulars of the suit can be collected from such preliminary pleadings. In each Court the declaration on a bill of exchange or promissory note is somewhat more explanatory, for it describes the note and shows whether the defendant is sued as drawer or acceptor, &c.—but since the new rules were established, the Counts on bills and notes in the Supreme Court are as simple and brief as declarations on such instruments in the Small Cause Court. On the whole, it seems to me, that in actions for debts and liquidated damages, and for several other matters, it signifies little what form, or whether any form of declaration be adopted. It is only requisite that the defendant have notice of the claim preferred, and that may be communicated in

various and very simple ways. When relief is sought either in Law or Equity upon unusual grounds more precision in the introductory pleading may be expedient.

If therefore the declarations used in the Small Cause Court be similar to those employed in like cases in the Supreme Court it may well follow that, so far, a case for trial is brought before a Judge as satisfactorily in the one Court as in the other. But my concurrence in the opinions of Sir Erskine Perry on this subject goes no further, for in the Small Cause Court there is virtually no pleading at all on the part of the defendant, who alleges he is not indebted, or makes some statement equally vague, and under such a plea is permitted to adduce any matter which may form a defence to the action. Although this answers in a Small Cause Court, where the Officer acts as agent, or legal assistant to both parties, and is thus previously apprized of the defence to be set up, I cannot think with Sir Erskine Perry that a case is not brought before the Judges more satisfactorily in the Supreme Court than in the Small Cause Court, for, in my opinion, the procedure in the Small Cause Court is chiefly defective, because the Officer of that Court acts as agent and legal adviser to both plaintiff and defendant. The mode of pleading in question may be the best which could be adopted under what thus appears to me a very imperfect system, but it does not remedy what I consider the defect, and that mode of pleading would be insufficient in the Supreme Courts where, as in the Superior Courts in England, the respective litigants have each his own professional agent and adviser. Formerly in those Courts, a very vague, general style of pleading on the part of the defendant was admitted in cases of the same description with those within the jurisdiction of the Small Court, but in order to obviate the consequent inconvenience, and the necessity thereby engendered for the plaintiff coming armed at all points, new rules requiring greater precision in pleading on the part of defendants were prescribed, first in England, and afterwards in the Supreme Courts of India. Still, in many important matters, great latitude of pleading is allowed to defendants in the Superior Courts, as well in England as in this country; but the effect of the new rules has been the introduction of greater precision in pleading by defendants, and considering that those rules were framed by the Judges of England, we may hesitate to yield to the opinions of those who would virtually abolish pleading altogether.

But the Small Cause Court at Bombay, it is argued, has succeeded, and therefore the proposed Court must be successful. The jurisdiction of the Small Cause Court is limited—that of the proposed Court is to be

unlimited. The Small Cause Court coexists with the Supreme Court, a better tribunal, affording to Judges, suitors and the public an example, as I believe, of a better administration of justice, and the Judges, being chiefly occupied in the latter Court, are less liable to become arbitrary, negligent or ignorant. The proposed Court will soon become the only tribunal at each Presidency, for as the cheaper forum, it will carry off all business from the Supreme Court, especially as it is probable the Judges of the former will be unable to resist a leaning on their parts towards the plaintiffs. It is well known how business increased in the Court of Common Pleas in Ireland owing to Lord Norbury's inclination to the plaintiffs.

In the 30th Section of his Minute Sir Erskine Perry speaks of examination of the parties as adopted in the Small Cause Court at Bombay, and in the 39th paragraph of his letter to the Government of Bombay he says 'the parties are examinable in that Court at each stage of the inquiry, and that therefore, in every case where conflicting testimony occurs, immense advantage is obtained by the power of sifting the parties themselves. I hence conclude that Sir Erskine Perry, when presiding in the Small Cause Court, examines and sifts the parties. I have myself gone as far as I have seen other Judges go in that Court—that is to say—when a case has been nearly brought to a conclusion, and it has become almost certain whether the plaintiff or the defendant would succeed, I have asked the losing party if he had any thing to say with respect to such and such matters, obstacles to his success. This I have done, not intending to rely upon what the party might say, but in order to obtain a clew to further evidence, if any, and because it often happens that the Officer of the Court has not been fully informed by the parties, or has failed to elicit all the particulars of the case. I have never seen any other Judge go further in the Court in question. Sir Erskine Perry's practice may be very salutary, but I am not aware of the law or custom by which it is authorized.

I incline to think that the vivâ voce examination of parties to suits in Law and Equity would have a beneficial effect. If that procedure be expedient and should be legalized, it would in itself work an important change, and greatly reduce the expence of litigation. It might be as well to try such an experiment before having recourse to the greater innovations recommended by the Law Commissioners. Against such a measure it may be strongly urged that thereby the system of intermediate agency between the Court and the suitor is violated—that system by which, to use the words of Sir Lawrence Peel,—" in spite of natural " inequalities, the powerful and the weak, the negligent and the igno-

" rant, the bold and the timid are enabled to meet in equal terms on the " arena of justice." It is said that to place suitors on equal terms, you should take their examinations, as well as their pleadings, from their law agents, giving to the other side the power of excepting to insufficient answers or examinations, and relying on the penalties against perjury and the characters of the practitioners as protections against falsehood and fraud. The mental qualities of suitors are indeed as various as their physical strength. One party may be dull, ignorant or old; his memory may have failed, he may be agitated or nervous. If required to answer, on the instant, to matters contained in a bill or answer, or to things relating to the subject of dispute in an action at law, he may make incorrect statements or admissions to his prejudice because he makes them without due and just qualifications. Very different would be the situation of an able, bold or cunning person, self-possessed and fertile in resources and explanations. To a considerable extent however the like objections apply to vivâ voce examination of witnesses. It may be replied indeed, that the statements or answers of a party may be looked upon as admissions without due allowance being made for mental or physical infirmities, or without its being perceived that anxiety as to the result, or other matters, so agitated the examinant as to incapacitate him from doing justice to his case. Are Judges incompetent to the full perception and consideration of such matters and the making just allowances accordingly, or are Jurors supposed equal to these arduous duties which are frequently entrusted to them when trials of issues are directed by the Court of Chancery? However these queries should be answered— the feeling in England is adverse to the vivâ voce examination of parties, and although under decrees in Equity the Master is directed to examine witnesses, vivâ voce, if he thinks fit, he is only allowed to examine the parties on interrogatories.

I do not greatly advocate the vivâ voce examination of parties upon the ground that Judges may derive assistance from observing the demeanour of the plaintiff and the defendant. Unless in peculiar instances, where deportment is strongly marked and of a very decisive character, I think it unsafe to allow the demeanour, even of an ordinary witness, to have much influence on the mind. Judges, Jurors, Barristers unemployed in the pending suit and bystanders, often, differ widely in their respective estimates of the demeanour of a witness, and very fallacious opinions, I believe, are often formed by those who much rely on such criterions. In my opinion indeed, the most formidable objection to the vivâ voce examination of parties is, that it would to a great extent violate the system of intermediate agency between the Court and the suitor, and place Judges in a situation in which they would be par-

ticularly liable to contract sympathies, antipathies and prejudices, or to indulge, strengthen or give effect to such affections if pre-existent, or otherwise derived. In the 2nd page of Mr. Gresby's book on evidence there is the following note: "Doubtless a Judge will occasionally "betray a feeling or a bias of which advantage may be taken: suitors "are said sometimes to have assumed the appearance of poverty in order "to find favour in the eyes of Lord Hale." Sir Herbert Compton told me that the leaning of the Court to pauper parties was matter of observation at Calcutta, and I have heard it strongly hinted at in the Court at Bombay. But as already suggested, if the vivâ voce examination of parties be inexpedient, might they not be examined on interrogatories? Might not each party, as well at Law as in Equity, be permitted to file or deliver interrogatories for the examination of the other? Pleading in Equity might then be abbreviated. Bills of discovery, with reference to actions at law, might be abolished; and if defendants in Equity were to be considered acting parties, and entitled to call upon the Court to order fraudulent instruments to be cancelled, &c., cross bills might be also disallowed. A bill to enable plaintiffs and defendants to examine each other on interrogatories was brought into the House of Lords by Lord Wynford several years ago, but was thrown out, being opposed by the present Lord Chancellor and Lord Eldon.

Shortly before Mr. Anderson acted as Governor of Bombay, he told me it was intended to establish at Calcutta a Court similar to the Small Cause Court at Bombay, and he asked what I thought of the latter. At that time, I had no idea the discussion now pending could arise, and so far, my reply, that it required great care to prevent the Small Cause Court from becoming a nuisance, was perfectly impartial. That opinion was founded on experience as Counsel as well as upon the Bench. I thought that as in the Court in question Judges were to a great extent uncontrolled and unassisted by Counsel, the proceedings were sometimes over summary, the law delivered of inferior quality, and material points of law and fact undiscovered or unnoticed. Evils of the latter description, I thought frequently arose from the Officer of the Court acting as agent for both parties, by one or other or both of whom he often was distrusted, and was thus kept in the dark, as to important features in the case. It is a common allegation of the Officer, that he has been unable to get such a party or parties to attend upon him. Even when sufficient attendance of parties is attainable the Officer cannot be expected to feel the same zeal, or to exhibit the like energy or skill on behalf of either of the suitors, or for both, as would be evinced by a professional assistant for one party only. Moreover, as the Officer acts as

agent and legal adviser to both parties, and has personal intercourse with them in those capacities, he is very liable to contract a bias to one side or the other, and, I think, almost always does so. The Judge, it seems to me, is very much in the power of the Officer, who states the case on both sides to the Court, and the party against whom the Officer has a leaning, is pretty much in the predicament of having his case stated by his opponent's Counsel. Owing to the above circumstances, it appears to me that the Court for Small Causes, though a good Court of the kind, and useful—holds out great encouragement to fraudulent litigation, and does injury to some extent, to the welfare and morals of society. It may be said that many of the evils alluded to are attributable to the intermediate agency of an Officer, whereas in the Court of the Law Commissioners, the Judges are to perform those duties which devolve upon the Officer in the Court for Small Causes. I do not, however, impute any wilful misconduct to the Officer of the latter Court. I merely think he is influenced as a Judge or any other man would be, if similarly circumstanced; that the Judges of the projected Court will be influenced in the same manner, and that as they are to have greater power greater evils will ensue.

It appears from the Draft of the Act prepared by the Law Commissioners that in the intended Court the plaintiff, or under certain circumstances, his agent, is to appear before a Judge or Commissioner of the Court, and orally, or in writing, lay the case before the Commissioner, who thereupon, and from what he may elicit by examination of the plaintiff or his agent, is to frame the declaration. If the Commissioner discerns any cause of action the defendant is to be summoned or arrested as the case may require; and he, or under certain circumstances his agent, is to appear before the Commissioner, who may examine him, and who, in the presence of both parties or their agents, is to proceed to take the pleadings and settle the demurrers and issues of fact.

Whatever renders a Judge active in conducting a cause is bad in principle and inconsistent with his functions—an axiom which in every stage of procedure prescribed for the intended Court is wholly disregarded. Whilst unusually extensive powers are given to the Judge the system of intermediate agency between him and the suitor is violated throughout, and accordingly, prejudice and passion will have ample room as well as ample grounds to operate.

In the first instance, the Commissioner is to discharge those duties which an able, upright Attorney performs towards a client preferring a

claim against another person. He is to hear or receive the statement of the claimant; elicit by queries or otherwise, further information, if expedient, for which latter purpose he is to be armed with power to punish prevarication or falsehood, and he is then to determine in his own mind whether there be any valid cause of action. I think all this would be better done by an Attorney, to whom, as being his own agent, and of his own selection, and not a Judge, the party might be more candid and unreserved. I have the less doubt the Attorney would be more effective than the Commissioner, because the latter is also to act as agent and legal adviser to the defendant, and the plaintiff will be most reluctant, I believe, to confide the whole matter to the Commissioner, and will endeavour to conceal weak points, and whatever may, in his opinion, have an injurious effect upon his case, all which an Attorney might be able to discover. The like observations may be also made respecting the Commissioner's agency for the defendant. Should either party appear to shuffle, with a view to better his case, the Commissioner, whether he impose a penalty or not, may contract a bias against him, but I think his leaning will usually be against the defendant, for his more active agency will in general be exercised for the plaintiff, with whom, to some extent, he may identify himself accordingly. Besides, much delay and many adjournments will often occur before the case of each party can be fully understood in order to being duly expressed in the pleadings, and the Commissioner will want zeal and inducement to exert such energy, skill and patience with respect to either of or both the litigants as would be exercised by a responsible Counsel or Attorney acting for one party only, and in the absence of professional control and assistance, the Commissioner's conduct may be arbitrary, he may fail in discovering material facts and points, for parties themselves may be blind to facts as well as points of law, if they do not perceive how they affect the case, and the law delivered may be frequently inferior in quality.

Not only are Judges and the parties themselves blind to important matters of law and fact which with professional aid would be discovered, but it often happens that where a Judge perceives a point, he at first considers it untenable, and if alone would unhesitatingly overrule it, and yet the same point is afterwards put by Counsel in a different light, and becomes the principal feature in the case. It may be said parties are to be at liberty to employ Attornies and Counsel in the intended Court, but for reasons already given, I think they will seldom have such assistance, especially as they can only have it under restrictions; and the Draft of the Act obviously imports that the Commissioners are in general to discharge those duties which are now usually performed by Attornies

or Counsel. In general therefore it is to rest with a Commissioner, professional or unprofessional, unchecked and unaided by Counsel, to determine whether the plaintiff has stated a good cause of action, in other words, whether the action is to be instituted or not, and also, whether any and what points of law, or issues of fact are to be raised: these last mentioned matters must be left to his discretion, unless it shall be incumbent on him to take every demurrer and raise every issue suggested by the parties, in the latter case endless prolixity and nonsense must ensue, and if he is to exercise discretionary power in such particulars, he will be often subjected to reproaches and upbraidings, not always unjust, from the unsuccessful party.

Although Sir Erskine Perry discards written pleading altogether the Law Commissioners adopt them. As already mentioned, my own conviction is that pleadings at law in the Supreme Court are already more concise than pleadings will be under the system of the Law Commissioners, and I have no doubt that pleadings in Equity might be reformed so as to secure a like result. The Commissioners of the intended Court, whether professional or unprofessional, would find it difficult to frame declarations or pleadings more brief, and yet sufficient, than those most commonly in use on the plea side of the Supreme Courts:—in the more unusual pleadings there is much room for improvement. Abbreviation is difficult and laborious, and considering how irresponsible the Commissioners of the proposed Court will be as compared with Barristers and Attornies, I think that after a little time their pleading will be inadequate and prolix. In brevity of pleading, I therefore believe nothing will be gained under the proposed system, and but little if any thing in the cheapness of drawing pleading. Most, or very many of the pleadings now used at law are drawn by Attornies, and for them a comparatively small rate of remuneration is charged; but whether pleadings be drawn by Attornies, Barristers or Judicial Commissioners, they must be paid for in one way or another. Under the new system Judicial Commissioners are to perform the part of Attornies, Counsel or Officers of Court, and thus a much greater number of Judges will be required, and if such Judges are to be remunerated upon any thing like the same scale as Civil functionaries in the service of the India Company, they must be highly paid, and yet the greater portion of their duties will be such as are now performed by Barristers and Attornies. A great portion of their pay may thus be considered as costs for their services in acting as Attornies or Counsel and in drawing pleadings; and upon striking a balance between such costs of drawing pleadings under the projected system, and costs as they might be reduced under

the existing system, I am confident there would be little, if any difference in favour of the former. Such costs of drawing pleadings by Judicial Commissioners would probably be extracted in some way from the suitors, but if not, they must fall wholly upon the Government, and if Government were to pay salaries to Officers of the Supreme Court instead of leaving them to be supported by fees, pleadings might be delivered between the parties, and the expense of pleadings would then be little if any thing beyond that incurred in drawing them.

Sir Erskine Perry believes he has fully met and refuted Sir Lawrence Peel's objections. It appears to me he has done neither. I shall not however go at any length into the argument, but limit myself to observing that Sir Erskine Perry assumes that those objections are resolvable into two propositions—"First, the proposed plan will introduce mis-"decision, and consequently uncertainty, into the law. Second, the "plan gives the Judge too much power." As to misdecision he says:— "This class of objections proceeds upon two assumptions, 1st, that the "proposed procedure will not bring the facts in each case to the "notice of the Court; 2nd, that upon the facts so brought, the Judge "will decide on arbitrary notions of Justice and Equity and not on "the substantive law of the land." This last position he terms an assumption altogether untenable and gratuitous, because "no change is "proposed to be made in the substantive law of the land but only in "the mode in which the controversies of suitors are to be brought for-"ward, in order to have that law applied to them." What he calls "the first assumption," viz., "that natural procedure will not bring out "the facts," and which he imputes to Sir Lawrence Peel, he says, "is "therefore all that needs to be noticed." After asking: "what arguments "have been brought forward by Sir L. Peel to warrant this assumption?" he says, "To me it appears that the great advantages of the scheme "consist in its aptitude to admit of all facts in issue between the parties "being readily brought before the Court, and that it is directly calculat-"ed to obviate those evils in the existing system by which essential facts "are often shut out, and by which so many decisions pass irrespective "of the merits of the case." He then alludes to cases at the Assizes in England in which through mistakes of pleaders and negligence of Attornies the parties have been turned round on the pleadings, or put out of Court by a failure to prove a notice or signature, and concludes by saying the Volumes of Reports "are equally full of "decisions where the interests of suitors have been concluded *for ever* "on some blunder or other of their legal advisers, and wholly irres-"pective of merits."

There are few professional men but will deny that this last assertion as to interests of suitors being concluded *for ever* on some blunder of their legal adviser, irrespective of merits, is warranted by any thing that occurs in England at the present day, and I am not aware that there has been any instance of the kind at Bombay. As to parties being "turned round on the pleading," I certainly think the Court at Bombay has not shown ready liberality in these matters, although on some occasions, to prevent the results in question, effective measures have been adopted and adjournments granted from day to day and even from term to term. I cannot at this moment recollect any case in which a party has been so "turned round," of late years, at Bombay, and if Judges have not already the power I think they possess of remitting rules and adopting measures to meet the exigencies alluded to, such power might easily be conferred, and its exercise rendered incumbent on the Courts. The mischiefs mentioned by Sir Erskine Perry could not indeed occur under the system he proposes, for thereby, as already shown, written pleading is to be altogether excluded; the parties are to tell their stories orally, and are not even to make use of petitions which "any one can "draw," lest the story should be told, not by the party himself, but by his legal adviser, and as there is no provision for reducing the oral pleadings into written pleadings, conformable to the plan of the Law Commissioners, parties cannot be turned round on the pleadings.

But the first assumption ascribed to Sir Lawrence Peel is—"that "the proposed procedure will not bring the facts in each case to the "notice of the Court," and one of the objections resolved into this last proposition is, that "the plan requires a Judge of higher qualities than "can be found, and even the highest qualifications would not be suffi-"cient to ensure success, because the Judge would have too much "power." It appears to me that to fulfil the duties of Attorney and Counsel to each of two adverse litigants, a man requires very high qualities indeed, qualities rarely, if ever, to be found; that some of the difficulties of acting in this double capacity are but little diminished, whilst others equally formidable arise where the same person also undertakes the office of Judge between the parties, and that he who presumes to exercise such various and inconsistent functions will probably fail in his duty as a Judge—especially as in each capacity he will have very great discretionary power—power, which from the infirmity of human nature and the want of adequate control, must occasionally or often be abused. It therefore seems to me that owing to the difficulty of the various duties assigned to the Judicial Commissioner in the intended Court, and the occasional or frequent abuse of the discretionary powers entrusted to him the proposed procedure, although it may often bring

the facts in a case to the notice of the Judge, inasmuch as the party, when not himself blind to them, may disclose them, yet that such facts may be distorted, disregarded or made light of as ignorance, prejudice or passion may suggest, and that under the like influence the law applied may oftentimes not be the substantive law of the land, but such law strained, shortened or misinterpreted as occasion may require.

But in the 23d paragraph of his letter Sir Erskine Perry mentions what he considers preventive checks upon undue exercise of power by Indian Judges—to wit " the Judges of the Supreme Courts have very " little of the moral support which Judges in England derive from the " influential classes of society." Therein, it appears to me, lies the greatest danger. Moral support would sustain them when right, and abandon them when wrong. Upheld thereby, they would disregard the cabals or opposition of those whose fraud, violence or injustice were corrected or impugned in the administration of the law, and the apprehension of losing such support would greatly tend to keep them within due bounds. Unaided and uncontrolled by this moral influence, they may truckle, temporize or shrink from uncompromising performance of their duties, or they may overstrain their power for their own gratification or that of others.

Sir Erskine Perry further intimates that the Local Governments and governing classes feel that the Supreme Courts have hitherto in some slight degree controlled them. The existence of any independant Court in the country would produce the like effect. As he observes, however, the restraint, although lightly and temperately administered, can scarcely prove otherwise than galling, and I believe it has long been their object to remove it, and various proceedings of the Law Commission are obviously tending, in various ways, to its removal and to the establishment of Courts of a very different character. Under such circumstances the Local Governments and governing classes may be, as Sir Erskine Perry leaves us to infer, very anxious to detect judicial errors, but the same feelings which occasion this anxiety indispose them to afford that moral support already mentioned, and which, by being attendant on a Judge when right, and forsaking him when wrong, is the chief security for due administration of justice. In fact, the Local Governments keep carefully aloof unless when cases are brought forward in which they are intimately concerned, and that is but seldom, for there is scarcely an instance of a prosecution for an offence by a Civil Servant being instituted in the Supreme Court, such matters being almost uniformly disposed of by Secret Committees, and as to Civil cases, there is generally such a leaning on the Bench towards the ruling power as

deters many a suitor from going to law. A man must have a strong case to succeed where he is opposed to the Local Government, and when at the Bar, I have several times advised against the institution of suits against the East India Company, or where the Government of Bombay upheld the opposite party, not because I thought the client had not a fair demand, but because I was convinced the Court would lean against him so strongly that even if he obtained a verdict he would probably be saddled with his own costs, or that very inadequate damages might be awarded. Still the Supreme Courts are some check upon power which would otherwise be more without control. Notice must be taken by the Government of glaring offences of Civil Servants, and redress for civil injuries must often be accorded, because the Supreme Court is open to aggrieved parties if they choose to proceed in it, and if driven to seek redress in that way publicity and inquiry are at least attainable, for where Attornies and Counsel practise they cannot well be evaded, and in Courts such as the Supreme Courts there are, even in this country, some strong restraints upon the Judges.

Another supposed preventive check is mentioned in the following terms: " the public press represents the interests of the executive classes " almost exclusively, and therefore has additional motives to the ten- " dency of a public press generally, to keep a rigid look out for Judicial " peccadilloes." The newspaper trade has a demoralizing effect on those engaged in it. In India, especially, the European societies being very limited, individuals frequently come into collusion, petty party-feelings and personal likings and dislikings are engendered, and when newspaper Editors assail or applaud a man, professedly on public grounds, it often happens they have been instigated by some dishonest, paltry motive. Hence, although their misstatements of facts are mischievous and annoying, their opinions are usually considered worthless. Each Indian newspaper primarily represents the selfish interests, opinions, party-feelings, piques and prejudices of particular individuals or cliques who are proprietors, or of its Editor, and in a small society these concerns are so paramount and absorbing that public spirit has but little opportunity to operate. If it be made worth while to the Proprietors or the Editor, directly or indirectly, as it often is, the newspaper will advocate the views of the executive classes and not otherwise. But the argument may be put into a small compass. Sir Erskine Perry does not ascribe the representation of the interests of executive classes by Indian newspapers to high or public feeling. It has rarely sprung from so pure a source. Hence, however, the public press may look out for Judicial peccadilloes, its censure, as its praise must fail of having full effect, and the preventive check in question must to some extent be feeble and ineffectual.

Lastly, Sir Erskine Perry thinks the Bar in this country " more " prone to concur to any carpings and cavils at Judicial authority, than " to support it, even in its due exercise, by their moral influence." That the Bar in India are not so useful in the latter respect as the English Bar I cannot deny, and, no doubt, unworthy characters are to be found at the Bar as well as in other walks of life, but they are soon detected and become insignificant. Still I fear the animadversions of the Bar upon the exercise of Judicial authority in this country are frequently correct, and I have no doubt they are more felt by the Judge and have greater effect upon him than observations from any other quarter, and are more effectual than any other check. There are always some men in the profession whose respectability, knowledge of law and honorable feelings are unquestionable; whose opinions cannot be disregarded, and who will abide by a Judge in good report or evil report so long as they think he has fairly done his duty, and who will only impugn his conduct when they honestly think him in the wrong. I therefore think the Bar form indeed a preventive check, but not because of their proneness to concur in carpings and cavils a quality which must tend to lessen their moral influence and ability to control.

Each of these supposed restraining powers, except the last, is represented as arising from the peculiar situation of Judges of the Supreme Courts. They are therefore inapplicable to the Court proposed by the Law Commissioners, the Judges of which, it may be inferred from the Draft of the Act accompanying the Report are to be appointed by the Governor of Bengal, and are to be paid, each, such a salary, respect being had to his qualifications, as to the Governor General in Council shall seem meet. It requires no great discrimination to perceive that such Judges will be circumstanced very differently from Judges of the Supreme Courts; that they will have a strict connection with the Local Governments of the country from which their appointments will have been obtained, and upon which the amount of each respective salary is to depend; that they will seldom or never be placed in any thing like conflict with the governing classes of the community, by which and by the press, so far as it may represent the interest of those classes, such Judges will accordingly be upheld. Neither can these supposed restraining powers apply to the Court proposed by Sir Erskine Perry. Should the tender of his services be accepted, and should he be appointed Chief Commissioner of such a Court, either at Calcutta or Bombay, he will have been appointed by the Local Government; in whatever light he may view himself he will not be viewed by others as a Judge of the Supreme Court, and he may not experience any want of that species of

moral support, the want of which he has relied on as restraining the abuse of Judicial power.

Judges in the Colonies, I understand, are to some extent dependant on the local rulers, and I have been assured that defects in the administration of justice consequently arise, although in each Colony there is usually a large European population, not forming a part of the executive class, but mixing therewith, influencing and controlling it, and although English colonists, if seriously injured, may become so clamorous as to make themselves heard in Downing Street or at Westminster, and therefore local rulers may study to appease them. In this country, however, there are but a few Europeans not included in or employed under the executive class, the influence and power of which class is therefore paramount. The natives have no intercourse on equal terms with the executive European class or with Europeans in general, and the difficulties they encounter in seeking relief in England are notorious. Hence, one ground of the expediency of having in this country Courts independant of and unconnected with the local authorities, and which, after all, has been but imperfectly effected.

Sir Benjamin Malkin, it appears, carried out at Singapore and approved of a system somewhat similar to that proposed by the Law Commission. His judicial qualities are highly spoken of, and under him the system may have worked better than could be expected under a Judge of less estimable qualities and inferior attainments. Still I should receive with great caution the opinion of a Judge as to the operation and effects of a favourite system. I should prefer the evidence of the suitors and practitioners, if any, who may have had experience of the Court during the period he presided in it. A Judge may imagine he has done a great deal of good in cases in which the profession or the public think he has shown himself a decided partisan.

Warnings of danger from the abuse of judicial power have been represented as uncalled for, and Mr. Bentham is charged with having gone ludicrously far in the surveillance he proposed to exercise over Judges, but Lawyers of experience, including Mr. Fearne, have concurred in the following sentiments of Lord Camden. "The discretion of a "Judge is the law of tyrants; it is always unknown; it is different in "different men; it is casual, and depends upon constitution, temper and "passion. In the best it is oftentimes caprice; in the worst it is every "vice, folly and passion to which human nature is liable."

It is intended that the new Court shall administer Equity as well as Law. It is to have cognizance of matters within the jurisdiction of

Courts of Common Law, but it is to apply the Rules of English Equity whenever those Rules would be held applicable if such matters came under consideration in a Court of Equity. In short, when Equity would affect any matter brought forward in the proposed Court, Equity Jurisprudence is to be administered forthwith.

Many cases of fraud, accident, and even trust, as cases of bailment, and that large class of cases in which the action for money had and received is maintainable have long been cognizable at law though formerly considered proper objects for a Court of Equity. The Judges at Calcutta, as I understand them, are of opinion that the jurisdiction of Courts of Law might be extended to all cases of accident, mistake, dower and partition, account when not involving the execution of a trust, administration of assets and, to a considerable extent, to demands for specific performance. It seems to me that whether a case coming under any of these heads of jurisdiction could be properly taken cognizance of by Courts constituted differently from Courts of Equity would depend upon its particular circumstances. If the object of the suit were single, or not very complicated, and there was but one class of plaintiffs and but one class of defendants, all persons in each class having a unity of interest in the subject, it might be disposed of by a Court constructed like a Court of Law, but in such a tribunal it would be difficult to dispose of a suit to which there were numerous parties, all standing in different relations to the matter, such matter being manifold and complex.

The procedure recommended by the Law Commissioners is represented as all sufficient, and equally adapted to all cases whether of legal or equitable cognizance. If it be indeed so, there could be but little gained by transferring matters of Equity to Law in the Court they propose to erect, and it might be better to preserve the present distinction between legal and equitable jurisdiction, and to appropriate to each a particular side of the intended Court, for such a measure might prevent them from being mixed up, as Mr. Justice Story says, "in a manner not easily comprehensible, elsewhere." So also, in the Supreme Courts, if pleadings and proceedings in Equity were rendered sufficient without being redundant, there would be but little, if any advantage in the transfers from Equity to Law which the Judges of Calcutta advocate. I concur in their views, subject to the qualifications mentioned in the last paragraph, and if the existing procedure in Equity is to remain unaltered I have no doubt that much good would often result from the measures they propose. But such good would arise because a man could sue at law cheaper than in Equity. Whether a matter of Equity be brought forward in a Court of Law or in a Court of Equity, it should be intro-

duced by appropriate pleadings. A simple matter of Equity might be brought before a Court constituted as a Court of Law, by means of pleadings perhaps equally brief with those usually resorted to in such a Court: why should it not be brought forward in like manner in a Court of Equity? Putting summary procedure out of the question, if a complex matter of Equity could be disposed of in a Court constituted as a Court of Law, it could only be by means of pleadings of much greater length, and more complicated and numerous proceedings, than would be necessary for such subjects as are usually committed to Courts of Law:—but why, in a Court of either description, should the length of procedure be disproportionate to the subject; and does not the difference in this respect between a Court of Law and a Court of Equity chiefly arise from those peculiarities in the latter, for which in a former part of these observations I have suggested remedies? Would not the adoption of vivâ voce examination of witnesses in Equity in itself work a great and salutary change? Might not summary procedure, as exercised in bankruptcy, and such measures as the Judges of Calcutta suggest in the last paragraph of Sir Lawrence Peel's Minute be introduced with good effect; and if all or many of these alterations were accomplished wherein would the procedure at law have advantage over that in Equity, and in such a state of things, what benefit would result from transferring to law particular branches of Equity jurisdiction, except so far as Courts of Law might thus be enabled to dispose of a simple matter of Equity incidentally or unexpectedly arising in the course of an action at law. Courts of Law already exercise power for such purposes to a considerable extent, to wit, in cases of accident, mistake and fraud, and in such circumstances as occurred in Legh *versus* Legh, and the cases mentioned in note *(a)* 1 Bos. and p. 448.

The Law Commissioners seem to aim at an unlimited extension of the last mentioned power, judging from their arguments on such subjects they claim for their Court authority to dispose of any matter of Equity, however complicated in character, or whatever number of persons may be interested therein, which can arise respecting the subject of an action at law. Judging from those arguments, they apparently contend that such matter of Equity should be summarily disposed of in a Court of Law, upon the same pleadings alone as the action of law required, irrespective of the equitable matter, and with the parties to the action at law alone before the Court.

The Law Commissioners adopt the imperfect Report of Rattle *versus* Popham, 2 Strange 992, and state that case as follows: "It appeared "that upon a marriage settlement a power was given to every tenant

" for llfe, when in possession, to limit the premises to any woman he " should marry, for her life, by way of jointure and in lieu of dower. " The tenant for life made a lease for 99 years determinable on the death " of his wife. Lord Hardwicke in a Court of Law, held the lease not to " be warranted by the power." They add, apparently on the authority of the Report of Zouch and Woolston by Burrow, the following words therein attributed to Lord Mansfield,—" the widow brought her bill in " the Court of Chancery, and Lord Talbot, arguing from the same " premises, the power and the lease, without any other circumstance, " held the lease to be warranted by the power." According to the same Report Lord Mansfield stated that Lord Talbot had declared, " it was " not a defective but a blundering execution of the power, and had " decreed the defendant to pay all the costs both at Law and in Equity."

The Report in Strange is erroneous because it is therein stated that the power was to limit by way of jointure and in bar of dower, whereas it appears from the Report of the case in Chancery as given in Sir Edward Sugden's work, upon the authority of the Registrar's book, that the power was not to give an estate in bar of dower, but the power was " for " Walter when he should have any estate in possession in the premises " for his life, by any deed, to assign, limit or appoint to or for the use of " or in trust for any woman or women that should be his wife for her " life, in lieu of jointure, all or any part of the premises, to take effect " from his decease," thus he was left at large to make a provision for his wife, and it was not essential that such provision should be in bar of dower. Had it been so the execution of the power would have been erroneous for the additional reason that the estate given by Walter Savage, was no bar of dower. The statement of the case in Equity as attributed to Lord Mansfield in the Report in Burrow is perhaps erroneous in several respects, but is certainly wrong in this that it is therein said Lord Talbot " decreed the defendant" (Savage, the remainder man) " to pay all the costs both at law and in Equity." In Sir Edward Sugden's work the decree, upon the authority of the Registrar's book, is stated in the following words. " It was decreed that the plaintiff should " be quieted in the estate comprised in the jointure-deed during so much " of the 99 years as she should live, and the defendant was to " pay unto the plaintiffs their costs of the suit; and the injunction " formerly granted in this cause for stay of the defendant's proceedings " at law against the plaintiffs was to be continued."

Thus it appears the defendant was not decreed to pay the costs at law as well as in Equity, and when we detect so material an error, it is not unreasonable to suppose that in other respects also, with regard to

this case, either Lord Mansfield may have been wrong in making the statements ascribed to him by the Reporter, or the latter may have been wrong in imputing them to Lord Mansfield. The latter supposition seems to have been embraced by Lord Redesdale, see Shannon and Brodstreet, 1 Sch. and Lef. 70-71. The account of the case in Ambler 342—so far as it goes, corroborates that given in Sir Edward Sugden's Appendix. The Statement regarding Burlton and Ux: *versus* Humphries and others, in Canc. imputed to Lord Mansfield in four Burrow 2056, is another instance in which, either Lord Mansfield misstated the case, or the misstatement was wrongfully ascribed to him by the same Reporter. Amber 256 and Clarke *versus* Parker 19 Vesey, 20-21.

With respect to Rattle and Popham, Lord Mansfield is represented to have said that "Lord Talbot, arguing from the same "premises, the power and the lease, without any other circumstances, "held the lease to be warranted by the power." I shall endeavour to show that Lord Talbot did not maintain any such doctrine. Lord Mansfield is represented to have asserted that Lord Talbot said "it was not a defective but a blundering execution of the power." No such expression is imputed to Lord Talbot in the Report contained in the Appendix to Sir Edward Sugden's Book, although some at least of the dicta of Lord Talbot on the case are therein professedly given; nor is any such expression attributed to Lord Talbot by the Master of the Rolls in Alexander *versus* Alexander, or by either of the Lords Commissioners, Willes and Wilmot in Churchman *versus* Harvey, or by any other authority in any instance in which Rattle and Popham or Newport and Savage has been mentioned. In fact, Newport and Savage is always classed amongst those cases in which relief has been given against the defective execution of powers, and it is clearly an instance of defective execution within Lord Redesdale's definition in 1 Sch. and Lef. 63.

But whether Lord Mansfield was wrong or not in making such statements and using such expressions regarding the case of Rattle and Popham is unimportant, except so far as error in those particulars may detract from that weight which so high an authority might otherwise possess. His conclusion respecting this point of equitable jurisdiction was no doubt conformable to his opinions on similar subjects. It may be assumed that he held that as the statute of uses makes good at law whatever is a good power or execution in Equity, it followed that whatever was an equitable ought to be deemed a legal execution of a power.

Unquestionably the same construction of a power should prevail at law as in Equity, and so it does. A power to limit an estate of freehold

is construed at law as not authorizing a grant of a different species of estate, as a term for years, and the same construction prevails in Equity, which, however goes further, and although holding the grant for years not warranted by the power, yet, if there be no fraud, and the grant was made for meritorious consideration, will make a decree, which without declaring the estate for years to have been duly made, will yet relieve the grantee by securing to him the enjoyment of it, consistently with the intention of the grantor, and of the person who created the power. The distinction was apparent to the Law Commissioners, but they have not embraced it. They say "Lord Redesdale admits that whatever is a "good power or execution in Equity the statute of uses makes good at "law, but he implicitly denies that such an execution of a power as the "lease in the case of Rattle and Popham is good in Equity. According "to him it is only such an execution as a Court of Equity, by its pecu-"liar mode of acting will make good." They then proceed insisting upon the opinions of Lord Mansfield and Mr. Justice Wilmot as given in Burrow, as authorities, and conclude "that the only reason why a Court "of Equity acts in such cases in the peculiar mode alluded to, is for the "purpose of making such an execution of a power good at law." Now in this the Law Commissioners are quite wrong, for to take the case they have themselves selected, although if the execution of the power in Rattle and Popham, could have been, or had been held good at law there would have been no necessity for the Court of Equity to act, yet the decree respecting Rattle and Popham did not make the execution of the power in that case good in law, or declare it to be good in any respect. The decree left the execution bad at law, and merely provided on consideration of the circumstances that the remainder man should not avail himself of the defect. No conveyances were directed, and the matter remained at law as before the decree in Equity, except that the remainder man was enjoined from proceeding at law by ejectment or from disturbing the possession of the widow. It seems the bill was in the nature of a bill for quiet possession. Cockshot and Parke Tothill's Rep. 177. Hughes *versus* Modern College 1. V. Senr. 187, Prac. Regr. 254, &c. Equity Acts in such a case, not by making or declaring that which is bad to be good, but by exempting the case, in consideration of its peculiar circumstances, from the general operation of the law.

In Wykham *versus* Wykham 18 Vesey 415 and 423, Lord Eldon puts the matter, somewhat more explicitly than Lord Redesdale, in the following words. "I am not surprised, that any one attempting to "execute this power should have considerable difficulty how to do it. "He could not get far wrong in Equity, as being for a meritorious consi-"deration, it would do in Equity in almost any form in which that inten-

" tion was clearly expressed. I say, it would do in Equity, as although " the phrase is frequently met with in the common law reports, that what " is not a good execution of a power at law cannot be a good execution " in Equity, if by that is meant, that what cannot be sustained as a good " execution of a power at law cannot be sustained in Equity, I do not " agree with that interpretation. Though not a good execution of a " power *any where*, it may be that which a Court of Equity will take " care to have executed. I therefore agree with Lord Redesdale, with " the same difference expressed in his observations upon Lord Mansfield's " language in Burrow's Reports; not admitting as doctrine to be main- " tained, that what a Court of Equity will substantially support as a " good execution of a power in Equity is therefore a good execution at " law; notwithstanding it is confidently there stated, that there can " be no difference in the execution of a power at Law and in Equity. If " it is to be understood a strict literal execution, viz., that it was duly " executed, that must be the same both in Courts of Law and Equity: " but that a Court of Equity will inforce the substantial intention of the " person executing, where a Court of Law cannot deal with it, is, I " apprehend, extremely clear." See also Butcher *versus* Butcher, Gooday *versus* Butcher, 1 V. and B. 93 and 98 and 9 V. 393.—So also in Clarke *versus* Parker, 19 Vesey 21-22, Lord Eldon observes:—" Lord Mansfield, " in Long *versus* Dennis, says farther, "' I mention these cases to shew, " ' that the Court ought not to make strides in favour of a forfeiture;' "— and then Lord Eldon proceeds thus: " The strides, if any, were the " other way. What follows resembles his observations on the execution " of powers. I agree in the next passage, that there can be but one " true legal construction of a condition: but if the proposition is that a " Court of Law can hold a condition to be performed in all circumstances " in which a Court of Equity says, *though it is not performed*, relief " shall be given against the *non-performance*, that is utterly unfounded."

The phrase, "a good execution of a power in Equity," is a loose expression signifying, not that the execution is good *any where*, to use the words of Lord Eldon, but that a Court of Equity, accounting the execution bad, but considering that the act done evinced the intent of the party who had the power to execute the same, and finding there was meritorious consideration on behalf of the appointee, will secure to the latter such benefit as can be granted consistently with the respective intentions of him who created and of him who meant to execute the power. That such is the true construction of the phrase, and that with a view to give relief, Equity holds the execution bad, and looks upon the defective act, not as good, but merely as evidence of intention, several considerations tend to establish. If Equity held the execution literally

good it should relieve even a volunteer, whereas it only grants relief where there is meritorious consideration. If Equity in such instances held the execution literally good, it would be in effect to maintain the absurdity that to limit an estate for years was consistent with a power to limit for life; but to limit for forty years consisted with a power to limit for ten years. Equity would relieve the meritorious party intended to be benefitted by such an excessive execution as last alluded to. It would secure to him the use for ten years and no longer. It would do so, holding the execution bad, as at law, although the loose expression—"the execution is good for so much," might be employed.

If verbal inaccuracies are made ground for the position that what is held bad at law is held good in Equity, an accurate expression commonly used in Equity might be quoted to disprove the fallacy. An execution bad at law is frequently called in Equity, a defective execution, which expression imports that Equity considers it defective.

Whether the Law Commissioners be right or wrong in asserting that Lord Mansfield never meant to say that Lord Talbot found fault with the decision at law in Rattle *versus* Popham, it is quite clear that, according to the Report in Burrow, Lord Mansfield himself did find fault with that decision, and upon the ground that Lord Talbot, "arguing "from the same premises, the power and the lease, held the lease to be "warranted by the power, and said it was *not a defective* but a blunder-"ing execution"—words importing that the execution was good at law —a blundering execution but not a bad one. Sir Edward Sugden, however, shows 1 vol. 516—that Lord Talbot clearly held the execution bad at law, inasmuch as, sitting in a Court of Equity, he held, as appears from the Report of Newport and Savage, that it was a mere blundering but a defective execution. Lord Mansfield's argument is—the decision at law was erroneous, or the execution, which at law was held defective, would not have been declared in Equity, on the same premises, not to be defective. Sir Edward Sugden's position is, that in Equity, the execution was declared to be defective, and that therefore the argument of Lord Mansfield fails. If the execution was held defective as well in Equity as at Law, the construction of the power at Law and in Equity was the same: in each forum the execution was considered bad.

Lord Redesdale, in Shannon and Broadstreet, and Lord Ellenborough, in Burne and Prideaux, deny Lord Mansfield's imputations on Rattle and Popham to be well founded. Those imputations, so far as appears, went on the idea that the execution had been held in Equity not to be defective. Lord Redesdale obviously considers that it was

held defective in Equity in the same sense as at law, and perhaps Lord Ellenborough may have entertained the same opinion, for he arrived at the same conclusion, namely, that Lord Mansfield's imputation on the decision at law—in Rattle *versus* Popham was illfounded, and that imputation, as already shown, was maintained upon the position that the execution had been held good in Equity.

In maintaining his views as to legal and equitable jurisdiction Lord Mansfield had advantages in the case of Rattle *versus* Popham, for the decision therein at law was questioned upon other grounds than those assigned in 2 Burrow 1147. That decision went upon the resolution in Whitlock's case, and that resolution, it has been argued, was a mere obiter dictum, See Burne *versus* Prideaux, and has been said to have been held too nice. Also, the power extended only to a single life, and there was no injury to the remainder man by reversionary or concurrent leases. But at present there is no doubt that in Rattle and Popham the execution was bad, for the power was to limit a freehold whereas only a chattel was appointed, and the differences between the Estates in quality, in the qualifications they respectively confer, and with respect to executions, forfeitures, barring dower and the right of the remainder man to suffer a recovery are irreconcileable.

If the notions of the Law Commissioners were fully carried out, a man, in an action of ejectment, might acquire or retain possession of land in which he had agreed, but not in writing, to purchase from the owner of the fee a term of one hundred or two hundred years, paying a small rent for the same, the parol agreement being followed by such circumstances as in a Court of Equity would entitle the vendee to a specific performance, but which circumstances wholly depended on parol evidence. There would be no record either of the parol agreement or of the subsequent circumstances in the proceedings at law, indeed the purchaser's rights might be admitted without action, and in either case, whether his claims were litigated or not, at the end of the term the respective rights of the parties then entitled, if not utterly forgotten, would merely rest upon tradition.

Moreover, the Law Commissioners follow Lord Mansfield in maintaining that in actions of ejectment, such as Rattle *versus* Popham, a Court of Law should recognize title in an appointee under a power defectively executed, if there be circumstances in the case that would entitle the appointee to relief in Equity. One of the results of establishing this doctrine would be that a party entitled to an Estate for a term of thirty years might recover possession on an instrument purporting to

appoint an Estate for a much longer period, or a party entitled to one species of Estate would recover upon an appointment of an Estate of a different description. It would not appear upon the proceedings in an action of ejectment, how much the lessor of the plaintiff was entitled to, a point upon which the decree of a Court of Equity would be explicit. If a party who had thus recovered in ejectment continued in possession for some years the remainder man might have difficulty in enforcing his rights, and, at all events, the title deeds, muniments and assurances of property, would be inconsistent with the actual rights of the parties. Where a Court of Equity relieves an appointee under a defectively executed power without decreeing conveyances conformable to the equitable rights of the parties, the existing appointment is inoperative at law, and under it no possession can be recovered which by lapse of time or otherwise might confuse, obscure, or alter just rights, and the decree in Equity explains and rectifies the whole matter. Nor can the Law Commissioners say that the Court of Law should declare the rights of the parties, or decree conveyances. They follow the opinions and arguments of Lord Mansfield regarding actions of ejectment in which no such proceedings are admitted. Indeed, they contend (Report page 29) that a Court of Equity directs a conveyance merely for the purpose of conferring a good title at law. It would follow, that a conveyance must be wholly useless where a good title is already recognized at law. Equity decrees conveyances in order that they may answer the ends of conveyances;—in order that they may establish, secure and evidence good titles both in Law and Equity. It is generally expedient that such conveyances should exist for the security of property, and to prevent litigation and with the like views, if existing conveyances be inconsistent with the rights of the parties, the execution of perfect conveyances is frequently expedient, and where proper cases for such interference are made out Equity may decree accordingly. But it is imperative in a Court of Equity where an equitable title is bad at law, to have it made good at law by a conveyance. Equity may leave the title bad at law, as in Newport *versus* Savage, and without decreeing any conveyance, may secure to the parties, by equitable process, the enjoyment of their several rights.

These are but a few of the evils which may arise where to use the expression of the American Judge, Mr. Paterson, "there is no distinct "forum to exercise Chancery jurisdiction, and the Common Law Courts "equitise as far as possible." A Court of Law in order to dispose of matters of Equity connected with an action at law would have to go into all the circumstances of the case, for upon such circumstances and not merely upon a particular instrument or deed, the Equity would depend.

To determine even whether there was meritorious consideration it might be requisite to go into many circumstances not apparent on the deeds before the Court, and not duly brought before the Court either by the plaintiff or the defendant, and if the rights of the parties depended upon matters of Equity rather than, or as well as matters of law, many more parties might be interested in the matters of Equity than were before the Court with respect to the matters of law. It might also happen that the matters of Equity were by no means, or but insufficiently raised or brought forward by the pleadings, and might therefore take one or both the parties by surprise, and the determination of matters of Equity without proper pleadings and records would cause confusion and obscurity in the administration of justice. To such difficulties, Mr. Justice Kelly alluded in Lessee of Massey *versus* Touchstone, an action of ejectment, in which the pleadings were general, not an action for breach of contract in which the pleadings explicitly put forth the circumstances of performance and non-performance. He then drew the general conclusion that a Judge in a Court of Law should leave Equity to its proper tribunal, and not foreseeing any attack from the Law Commissioners, he inadvertently referred to the case then before him as illustrating the evils he referred to. The case was comparatively simple, and did not fully exemplify the evils in question. Thereupon the Law Commissioners fall foul of him, and, as Lord Redesdale says, " looking at particular cases rather " than at the general principles of administering justice, observing small " inconveniences and overlooking great ones, allege, inter alia, that Mr. " Justice Kelley seems to have entirely forgotten that the agreement in " the case referred to, and all the circumstances of performance and non- " performance are beyond all question the proper constitutional subjects " of common law jurisdiction," and conclude several pages of matter in the same strain by stating, " that where there is a *legal* agreement and " no formal objection which would preclude the party at law, a Court of " Equity will not decree specific performance unless it is satisfied that " the party is under the circumstances entitled to damages at law. That " is, the Courts of Equity hold that in such cases the question whether " there is a clear Equity depends upon the question whether there is a " clear title to damages at law."

As a portion of the premises to this conclusion the Law Commissioners have adopted the doctrine that because before Lord Somer's time Courts of Equity would not even entertain a suit for specific performance of an agreement until the plaintiff had first recovered damages at law for the breach of it, " therefore," according to the Chancellors who preceded Lord Somers, " not only were the Courts of Law competent to " this investigation," (" whether a party asking for specific perfor- " mance of an agreement, has a clear Equity") " but they are the

" only Courts which are competent to it." See the Report, pages 40 and 41.

The Law Commissioners thus assume that previous to the time of Lord Somers, Courts of Equity sent a party applying for a specific performance to try his right at law, *in order that the Court of Law might investigate whether he had a clear Equity.* But the true ground for thus sending the party to try for damages at law, was not that assigned by the Law Commissioners—probably not even that which is usually assigned, namely, to try whether the plaintiff had a *legal* right, i. e. whether the agreement was legal and the breach of it a wrong, points which in those early times a Court of Equity, it has been supposed, might have been unwilling to assume a right to determine. But as Mr. Butler expresses it: " the grand reason for the interference " of a Court of Equity is that the imperfection of legal remedy, in " consequence of the universality of legislative provisions, may be " redressed. Hence, for a length of time after the introduction of " equitable judicature into this country, it was thought necessary, that " before Equity should interfere, this imperfection should be manifested " by the party's previously proceeding at law, so far as to show, from its " result, the want or inadequacy of legal redress, and his claim for equit- " able relief."

If the defendant, in Lessee of Massey *versus* Tonelstone, had brought his action against the lessor of the plaintiff for breach of contract in not making the lease " all the circumstances of performance and non-performance" would have been before the Court of Law so far as was necessary to ascertain whether a lease had been made, whether there had been any breach of contract, and, if so, to estimate the damage, but not with a view to determine whether if the agreement were unperformed, Lord Massey should be compelled to perform it. The question whether a broken contract should be specifically performed depends, not merely upon " the circumstances of performance and non-performance" important in an action for breach of contract, but upon other, or all the circumstances of the case. Not only does Equity sometimes relieve by granting a specific performance where damages may not be recoverable at law, but sometimes it will refuse a specific performance where damages may be recovered at law, the rescinding and decreeing specific performance of contracts being in the discretion of the Court. If a plaintiff's title be involved in difficulties which cannot be immediately removed Equity will not compel the defendant to take a conveyance, though he might at law be subject to damages for not completing his purchase. 1st Fonbl. 190, note *(i)*, and see Mortlock *versus* Buller 10, V. 292. Thus, irrespective of the particular case before Mr. Justice

Kelly, the circumstances of performance or non-performance which are brought before a Court of Law with a view to damages for breach of contract to make a lease do not necessarily include those circumstances upon which it must depend whether a specific performance of that contract will be decreed in Equity. The latter are not " the proper legiti- " mate, constitutional subjects of Common Law Jurisdiction." The The Judges at Calcutta propose to make them so, but they are not so at present, and were not so at the time when the Report of the Law Commissioners was being written.

As I think all Courts should be empowered to examine parties, if not vivâ voce, at least upon interrogatories, I think such a Court as that proposed by the Law Commissioners should possess the power in question, and if an outstanding term should be set up in an action of ejectment, should be authorized to determine the effect of such term upon the same principles as a Court of Equity.

It is necessary to dwell upon those cases, much insisted upon by the Law Commissioners, in which Judges have expressed opinions regarding the boundaries of legal and equitable jurisdiction which have been long since overruled. No one doubts or questions that the latter decisions are the more reasonable and must prevail.

The Law Commissioners deduce from Moses vs. Macfarlane and Farquharson vs. Pitcher " that Courts like the Court of King's Bench, " ought to be furnished with the means of doing justice in all cases " within their jurisdiction, and that Courts of Conscience, inasmuch as " they cannot be furnished with such means without great risk of injus- " tice, ought not to be suffered to exist at all." If the Superior Courts could dispose of claims of small amount at a proportional expense, Courts of Conscience and tribunals of that description might be dispensed with, but hitherto no Court in any considerable degree capable of a sound administration of justice has been contrived or established in which the expence of litigating small demands has not been excessive, as being disproportionate, to the matter sued for. Thus Courts of Conscience and Courts of Requests for deciding petty matters have been hitherto necessary evils. For the reasons already given it appears to me that the Law Commissioners propose to erect but a very bad description of Court of Conscience, a Court which cannot be maintained without great expense to the country, if not to the parties, and which will be the more mischievous because it is to exercise unlimited jurisdiction.

I have long thought that under the judicial system at present existing a Court should be debarred from entertaining a suit or action in which it could not administer complete justice—therefore that a Court of Law should have no jurisdiction over cases in which the effect

of the judgment at law would directly or indirectly be annulled in Equity. In an action at law the moment it appears, although not specially pleaded, that matter of Equity, beyond the jurisdiction of Courts of Law, is involved, or incidentally comes in question, so as immediately to affect the rights of the parties, I think the plaintiff should be nonsuited on such terms as to costs a just discretion might direct. In this sense I think that an equitable title might be set up in ejectment as a bar to the further progress of the action.

I have already dwelt in general terms upon the question whether a Court engaged in administering law, should be allowed to "equitize," and if so, to what extent, Lord Eldon has said of the separation of Courts of Law and Equity: It "mainly contributes to the complete and effec- "tual administration of justice in this country, and secures to the people "an administration of justice to an extent and in a degree such as are "unknown, and must be ever unknown where that separation is not "effectually made and observed." He perhaps overrated the effects of the separation alluded to, and it certainly appears to me that in some instances the separation need not be observed so strictly as at present. But the Law Commissioners would wholly abolish it. The weight of authority is indeed against them: but they make light of it, and assail even Lord Redesdale, to whom they impute the following sophism. "The Scotch Courts are bad. The Scotch Courts administer Law and "Equity together. Therefore Courts which administer Law and Equity "together are bad." It is fortunate for the memory of Lord Redesdale which must otherwise have been grievously damaged through this perversion of his argument by the Law Commissioners, that what he did say is contained in his judgment in Shannon vs. Brodstreet and is published in the report of that case. But experience as well as authority is opposed to the views of the Law Commissioners. I have shown what have been the results of experience in these matters in The United States of America, and the experience which England had of the Court of Exchequer, although Equity was administered therein as distinct from law as could well be in a Court administering both Law and Equity, was the chief reason why the equitable jurisdiction of that Court was taken away and given to the Court of Chancery in the year 1841.

I have no doubt that if the proposed changes be salutary for India it would be at least equally salutary for England to effect similar changes in that country, and therefore there is reason to believe that these propositions of the Law Commissioners will be duly canvassed by competent jurists before their adoption in India permitted.

H. ROPER.

THIRD SUPPLEMENT TO APPENDIX.

TO THE RIGHT HON'BLE THE PRESIDENT OF THE COUNCIL OF INDIA IN COUNCIL.

RIGHT HON'BLE SIR,

I have the honor to transmit to you the copy of a Letter which I have addressed to the Honorable the Governor of Bombay in Council.

I should not have ventured to address the Supreme Government directly upon this subject, had it not been that the enclosed letter is a reply to a Minute of the Chief Justice of Bombay, containing statements affecting my accuracy and general title to confidence, which has been forwarded to the Governor General in Council.

As inaccuracies and even gross exaggerations are not unfrequently to be found on the part of those who step forward to recommend public improvements, the charge is too plausible and endamaging to allow me to rest one moment without meeting it with a solemn denial, and furnishing the proofs on which that denial is based.

I have the honor to be,
Right Hon'ble Sir,
Your obedient faithful Servant,
E. PERRY.

SUPREME COURT, BOMBAY,
January 25th, 1845.

TO THE HONORABLE THE GOVERNOR OF BOMBAY IN COUNCIL.

HON'BLE SIR,

I have learnt with much pain that Sir Henry Roper has addressed an elaborate Minute not only to the Government of Bombay but also to the Governor General of India in Council, in which he imputes to me the having presented "highly colored views" and "incorrect statements" in my Official Minutes to Government, of matters connected with the Supreme Court of Bombay.

2. I do not believe that the Chief Justice attaches the same degree of moral culpability to these charges as I do, for he evidently thinks that so much passion is necessarily engendered in India in the discussion of even abstract questions like law reform, that even Judges may be pardonable if they do not exhibit themselves quite exempt from the grosser frailties of partizanship. What therefore from any other man I should hear charged with more emotion than I would willingly describe, I listen to in calmness (though perhaps not without a struggle) from Sir Henry Roper.

3. I cannot however conceal from myself the conviction that, whatever degree of blame the Chief Justice may attach to the fact of another Judge, putting forth exaggerated and incorrect statements of judicial matters, still he believes that I have done so, and by the solemn and public manner in which he has recorded his belief, the charge goes forth against me to all the world possibly, a charge made by the Chief Justice of that Court in which I have sat by his side as a colleague for nearly four years. It is incumbent upon me, therefore, not only in regard to the great public question in controversy, but also to my own character and reputation, that I should not let a moment slip in hastening to vindicate myself from imputations, which might otherwise adhere to me indelibly. In doing so, I trust that the Government will bear with me for a short time, whilst I enter upon more personal details than would, under other circumstances, have been excusable.

4. I would first premise, that the paper which is alledged to contain these colored statements was written by me after a very minute and careful inquiry, in answer to an official letter of the Law Commissioners, addressed to Sir Henry Roper and myself, that after I had finished it, I submitted it for the inspection and approval of the Chief Justice, first

of all, because it was due to him that he should be acquainted with all I did officially, and secondly, because I was sanguine enough to hope that he would concur with me in recommending a proposal to rectify those evils in the procedure of our Court, which I felt confident that he could not deny. With this hope I abstained from forwarding my Minute for a whole month, and although I had repeated communications with the Chief Justice during that period upon the subjects contained in my Minute, not one word of disapprobation or questioning of any of the facts or even opinions, therein stated, ever fell from his lips. I failed (it is true) in pursuading him to add the sanction of his name to the recommendations I had made, but in the joint letter which we drew up together on forwarding my Minute to the Law Commission, it is impossible to trace other than a most harmonious spirit existing between us.

Appendix A.

5. In confirmation of what I have above stated, I venture to subjoin a contemporary note which I made at the time in my own private journal of my studies and pursuits.

6. Two months after I had laid this Minute before the Chief Justice, he also wrote upon the subject to the Law Commissioners, and although his hostility to any reform being made in the Supreme Court at the hands of that body is very apparent, and although I then learnt for the first time his objections to some portion of the reasoning I had advanced, still I considered that in the main our speculative views were not widely divergent, and his tone towards me was undoubtedly courteous and even complimentary. But his Minute speaks for itself as it is printed in the Appendix of the Law Commissioners' Report.

Report dated 15th February 1844, from the Law Commission to the President of Council in India; App. p. xxi.

7. From that moment till the perusal, three days ago, of the Chief Justice's Minute, that is to say for a period of sixteen months, he has never given me the least reason to suppose that he entertained any doubts whatever as to the accuracy of the facts I had advanced, or as to the law I had delivered in Poonjia Cawnjee's case.

8. Having premised these matters, which I have done at some length in order to correct the notion that might otherwise have arisen, that there had been any want on my part of frank and cordial communication towards my colleague; I pass them over; and proceed to the much more important question between us, namely, as to the correctness of the statements advanced by me.

9. The matters alleged by me as facts, upon which the charges of colored views and incorrect statements appear to be based, are, so far as

I can discover, three; The proceedings in Poonjia Cawnjee's case; The expenses of litigation in the Supreme Court of Bombay; The irretrievable injury frequently inflicted upon suitors by decisions upon technicalities. I will discuss these in their order.

10. First; in Poonjia Cawnjee's case, I gave to the best of my ability in my Minute of 3d June 1843, (paras. 18 and 19) as clear a sketch as was compatible with great brevity, of the proceedings in a suit which lasted for ten years and a half. Sir Henry Roper has also entered into very minute details of that case, and in the course of it he intimates that certain of the facts are wrongly stated, that the whole description of it is 'somewhat colored,' and taking upon himself the assertion of a fact* (the non-existence of assets) in total contradiction to the Judge before whom that fact was in controversy, he throws grave suspicions upon the judgment delivered.

Printed with the Law Commissioners' Report, App. to viii.

11. Now in the first place I must respectfully protest against the *obiter* criticism of the Chief Justice on a decision with which he had nothing to do, and of which he has no official knowledge whatever.† If the decision were wrong it might have been appealed against, at least I apprehend so, for the costs alone must have exceeded 10,000 Rupees, but it was acquiesced in by the parties, and therefore like other cases must be considered to have passed in *rem judicatam*. That doubts should be thrown by one Judge upon the decisions of another, where living parties are concerned and serious questions involved, appears to me to be a course fraught with the highest inconvenience.

12. But further, Sir Henry Roper in his account of the case states many matters that were never heard of by the Judge who disposed of the case, and he states other matters in a very different manner to that in which they were stated at the bar. I was at a loss to understand how the Chief Justice came by any knowledge at all on the subject, as he never conferred with me on the point, never that I am aware of read

* The Master expressly reported that the defendant was chargeable with Rs. 15,873, the plaintiff's claim being only (with interest) Rs. 4,503. This report was excepted to, but all the exceptions were overruled. It is incorrect therefore to state that "by an error of the Master the defendant was charged with Rs. 17,263 too much." At the instance of the Court (Ch. Just. Awdrey) the plaintiff's Counsel assented to a certain compromise, by the result of which the estate was found indebted to the defendant in Rs. 884, but this ultimate balance had nothing to do with the defence set up of want of assets, although the defendant's Counsel argued, as Sir H. Roper now argues, that that part of the defence was made out.

† In the June term and sittings of 1842, Sir H. Roper was seriously indisposed, in consequence of which nearly all the business in Court, and, amongst others, the case of Poonjia Cawnjee, had to be disposed of by me.

the judgment in the case, and certainly never read my notes of the arguments of Counsel at the bar. On sending however for the papers in the cause I discovered, what if I before knew, I had forgotten, that Sir Henry Roper whilst at the bar had been the Counsel for many years of the unsuccessful defendant.

13. But in order to demonstrate that my description of this case is correct to the letter, both of the facts on which the judgment proceeded, and the course of defence attempted, I subjoin in the Appendix a transcript of the Judge's Notes of the arguments relied on by Counsel, and of the judgment subsequently delivered. It will be seen by these that the case was very learnedly argued, and that the judgment, whatever may be its value in other respects, was prepared after a long industrious inquiry into all the points brought before the Court. Waiving therefore all questions of judicial etiquette, I fearlessly oppose my statement of the case, the statement of a Judge who had pronounced the decision under the most solemn sanctions, to the imperfect recollection and unofficial knowledge of a former Counsel in the cause.*

Appendix B.

14. Sir Henry Roper further remarks on this case that " it would be misapprehension to suppose that such evils as are exemplified by the statement" of it in my Minute " are of common occurrence." I have no need to combat this proposition, I never asserted that it was a common occurrence for a suit involving a simple claim on a bill of exchange to last as long as the siege of Troy. The unfortunate country where such procedure could exist as *the rule* must be far advanced in the stage of social dissolution. I cited this case as an illustration of the amount of harassment and vexation which a dishonest defendant is able to inflict upon his opponent by the means of Equity procedure. I re-affirm that the illustration is a happy one, but I will add my most solemn conviction that the case is by no means anomalous, and that many companions to it might be selected from the records of the Supreme Court during the last ten years with even aggravated features; and the conclusion I draw is that the system, which thus baffles the most vigilant Judges and Officers of the Court, in their efforts to administer justice, ought to have its blots pointed out to Government by those who are most interested to maintain the honor and respectability of the Court, and who alone are able to suggest and carry out useful amendments.

* I am bound however to acknowledge one blot which Sir Henry Roper has pointed out in my statements. I mentioned that the defendant's first answer was ruled insufficient *on argument*, it seems that the fact was the defendant admitted its insufficiency *without* argument. I believe, I committed an error, but it is so wholly insignificant, that is trifling to waste one word upon it.

15. The next point respects the expences of litigation on the Common Law side of the Court. These, Sir Henry Roper affirms, have been incorrectly stated by me, and he cites the Taxing Officer's estimates to show that the costs of a defended action are about Rupees 800, whereas I state them at about Rupees 1200; similar disproportions are shown in the other sums given by Sir H. Roper and myself, all of which will appear more clearly by the following table:

Costs of Suing on the Common Law side of the Supreme Court at Bombay.

According to Sir Henry Roper.		According to Sir Erskine Perry.	
Costs of defended action,...	Rs. 800	.....	1200
Exparte Causes,.....	192	.....	450
Cognovits, ...	147	.....	189

16. Here there is a direct issue of fact between us, and I proceed to produce the proofs to shew that I have advanced no temerarious or incorrect calculations. When in 1843 I was preparing my materials for a Minute on the Supreme Court, and had arrived at that portion which related to the costs of litigation in ordinary cases, I sent to the Taxing Officer for a return of the bills of costs actually taxed during the years 1840, 1841, 1842, and I have now the honor to transmit to Government the paper I received from that Officer. It will be perceived by this return, that my figures as to the costs of litigation are faithfully copied from his results. The principle which I kept in view in framing my calculation was, that the point to be ascertained was, not the minimum sum for which an action might possibly be conducted under the most favorable circumstances, but what the actual costs of litigation are under ordinary circumstances. I therefore considered that a period of three years was sufficiently long to give a fair average of the costs of litigation in each suit. But as I was apprehensive that this average might be too high, from the extraordinary costs which might have occurred in special cases, I took the precaution of applying a correction in the following manner. I sent for the Taxing Officer's books and selected a dozen cases from the year 1842, most of which I well recollected, and in none of which any extraordinary costs or procedure had occurred. They were in short the ordinary run of cases which are tried at our bar. On

Appendix C.

calculating the joint costs of plaintiff and defendant, I found that the costs to the losing party were not less than Rupees 1378-14, and probably more from the costs between Attorney and Client not being all taken into account. I have the honor to forward the estimate on which the above is founded.

Appendix D.

17. With this verification of the actual average on all cases during a period of three years, I unhesitatingly placed the latter amount in my Minute, and I now affirm that so far from being exaggerated, it is probably not less than two hundred Rupees below the actual average, from the absence of the costs between Attorney and Client which I have before noted.

18. If however I had committed a blunder on this subject it might have been leniently dealt with. The costs of litigation is a subject of which a Judge has no professional knowledge whatever, it is a matter wholly within the province of the Master, and it is always a matter of accident (I regret the fact) that the Judge hears what the expenses of suing in his own Court are. On a new technical subject, therefore, involving calculation, an error might well have crept in without calling for severe reprehension. A very remarkable instance of such error occurs in Sir Henry Roper's own Minute. In comparing the costs of suing in the Supreme and Mofussil Courts, he states that in the five years from 1839 to 1843 inclusive, the taxed costs of the plaintiffs amounted to Rupees 53,890-3-76, being about 3 per cent on the sums recovered; he then goes on to show what the percentage allowed by law to Vakeels is on suits in the Mofussil in order to prove that there is no great inequality between the two Courts. But in the return from which Sir Henry Roper has taken his results he has failed to see that a large proportion of plaintiffs did not have their costs taxed at all, and that the column containing the amount of costs is only the sum of those bills of costs which were actually taxed. The calculation however is not only wrong on this point, but Sir Henry Roper has altogether omitted to take into account the amount of the defendants' costs, so that, upon the whole, his estimate of the costs of suing in the Supreme Court is erroneous by probably not less than one hundred and fifty per cent.

Printed as a Supp. to the Appendix of the Report ali supra.

19. I proceed to the third point. In para. 26 of my Minute of 22d May, 1844, I appealed to the memory of Nisi Prius practitioners and to the Term Reports for instances of innumerable cases "where the interests of the suitors have been concluded for ever, on some blunder or other of their legal advisers, and wholly irrespective of merits." Sir Henry Roper affirms that "there are few professional men but will deny this last assertion, &c."

20. Here again we are at direct issue, and I content myself with appealing to the same tribunal which I before selected, namely, experienced Nisi Prius practitioners, and the Law Reports. It would be a curious examination before a Committee of the House of Commons if the leaders of the different Circuits and the Law Reporters of the Courts at Westminster Hall were examined on their oaths as to all the cases they could bring forward, where plaintiffs with probable good cause of action had been obliged to desist from further prosecuting their claim, on account of the preliminary expenses, which they had been put to in consequence of some error on the part of their legal advisers, having exhausted the whole of their available funds. I am not disposed to inveigh against Attornies as of a more obdurate or avaricious turn of mind than their fellows, but Attornies are men, and are governed by the ordinary motives of mankind, and though here and there a self-sacrificing professional adviser may be found, who will advance out of his own pocket sufficient funds to bring a poor man's cause into Court, it is needless to observe that such exceptional case will much more frequently occur in romance than in real life.

21. Sir Henry Roper rather appears to dwell upon my use of the words *for ever;* but of course he gives me credit for being Lawyer enough to know that a decision on a technical point does not *legally* bind the suitor for ever; at least does not always do so, for frequently after such a decision it is impossible to bring forward the case again, in any form. But in any case the ability for a poor man to bring forward his claim in Court, is, like his ability to enter the City of London Tavern, very much depended upon the length of his purse.

22. I have thus, I trust, completely vindicated my character for accuracy and trustworthiness. I may perhaps be considered too sensitive in my anxiety to repel charges which, in all probability, were not intended to denote any moral obliquity. But I confess that, by the standard of morals to which I desire to conform, a deliberate assertion of important facts which are untrue, and the untruth of which it is especially within the province of the asserter to ascertain, implies either such a mal-organization of the intellectual faculties, or such a moral obtuseness to the sacred interests of truth, that if I were not capable of repelling the aspersion I should feel myself wholly unworthy of the estimation of all honorable men.

23. I have felt indeed, doubts, whilst entering into the above minute details, whether any such defence was demanded from me, and I think that if the Minute which has called it forth had been confined to

the Government of my own Presidency where I am known, and where Sir Henry Roper is also known, I should have rested in calm security on the strength of my own reputation. Nor, in the feeling that the attack was inocuous,

"telumque imbelle sine ictu,"

should I have arrogated any merit to myself for my silence.

24. But reflecting that Sir Henry Roper's Minute has been addressed to places, where the accuser is only known as the Chief Justice of Bombay, and the accused as an inferior Judge of the same Court, and calling to mind the internal evidence which the paper bears of its having been in preparation for months, I felt that it was my imperative duty to make equally public, and at the earliest possible moment, the solemn refutation which it lay within my power to give.

25. In conclusion, I have only earnestly to entreat the Government not to allow this passage of arms, which has unfortunably occurred between the Chief Justice and myself, to draw off their attention from the important subject, in which it has sprung up as a mere incident. A noble opportunity, as I conceive, presents itself to this Government for conferring upon the community the greatest blessing which it is within their competence to bestow, I mean, an efficient, rational, and cheap tribunal for the solution of all questions respecting legal rights and obligations.

26. In the very long discussion which Sir Henry Roper has bestowed on the Law Commissioners' Report, much acute remark, though somewhat discursive, is to be found—much from which I see no reason whatever to dissent. The evils in the constitution of the Small Cause Court I have long been fully alive to; I have done my best to correct them so far as it was open to me by law as it stands, and where those evils required the hand of the Legislator to remove them, I have done all within my power to point them out. The necessity for checks upon Judges in the form of enlightened public opinion is one of the firmest-rooted maxims I possess within the whole province of jurisprudence, and I rather smiled to find myself brought forward as the impugner of Mr. Bentham's doctrines on the subject.

27. But with regard to the more minute objections which Sir Henry Roper has advanced against the Court of Natural Procedure; I trust I may be allowed, with all respect, to observe that he is scarcely

master of the subject. It would be sufficient therefore to refer him to a mass of printed works which have issued from the presses both of England and the Continent during the last few years, and especially to the works of Mr. Bentham, to prove that he has occupied himself in refuting dangers which are wholly imaginary.

28. He appears surprized to find that the Law Commissioners and myself have been contemporaneous in our recommendation of a Court based on similar principles, and he seems to entertain suspicions that something like "previous communications" may have existed to produce this unanimity. An acquaintance with the works I have alluded to would have indicated the source from which the proposition emanated.

29. Again, Sir Henry Roper imagines that he has fastened an absurdity on my opinions with respect to pleading, inasmuch as he supposes that in my proposition for oral pleading I would wholly discard the advantages which the art of writing has conferred upon mankind, and especially upon that portion of it who are engaged in litigation. The meaning of the distinction used by Jurists of "Oral Pleadings" and "Written Pleadings" has thus wholly escaped him, for oral pleadings no more mean that they should not be put into writing than unwritten law means that it is not to be found in printed volumes. Indeed the history of our own system fully proves that the Special Pleading of which the Chief Justice is so warm an advocate was for a very long period wholly oral;* and the account which Bracton gives (fo. 372 b.) of the conduct of a suit in Court, affords almost an exact *English* precedent of the procedure which it is proposed to introduce into Bombay. So far from omitting to record or put in writing the oral pleadings of the parties, I expressly alluded to the 'authentic records of proceedings of the Court when necessary,' which it would behove the Judges to secure, and I did this with Mr. Bentham's volume on Procedure before me, where the most admirable analytical forms for all species of actions and demands are traced out.

See para. 32 of first Minute, App. p. xiv. ub. sup.

30. The main argument which seems to be relied upon by Sir Henry Roper for a severance of the Courts of Law and Equity appears to be, that experience in America has pointed out the necessity for it, and the case of Pennsylvania is quoted. Without stopping to observe that this line of argument, as well as the instance cited of the Court of Exchequer in England, points to the necessity for two Supreme

See Bentham's Works, Vol. 4, p. 66 et s. q. q.

* "As the appearance (of the parties) was an actual one, so the pleading was an *oral* altercation, in *open Court, in presence of the Judges.*" Stephens on Pleading 2d ed. p. 30. The italics belong to the learned Serjeant.

Courts, one of Law, the other of Equity, a proposition which has never been thought of for India, I will merely enter my protest against being referred to America for Notions on Law Establishments.

31. The United States of America have blindly, though perhaps unavoidably, copied all their Legal Institutions as they wanted them from those of the parent country, one State adopting this set of provisions, another State another, just as the exigency of the moment required, without the least portion of science or philosophy pervading their systems. That flourishing but youthful country has been far too much occupied hitherto in applying its thews and muscles to subdue the physical nature around them to have been able to spare time in making contributions to the moral sciences, and the consequence has been that in the department of law, so far as I am aware, not one work of original or profound thought, with the exception perhaps of Mr. Livingston's Criminal Code for Louisiana has yet emanated from the American Press. In ameliorations of this science as in most others it is still the lot of America to follow in the wake of England, and I trust that the latter country in the noble words of Milton ' will not forget her precedence of teaching nations how to live.'

32. The very author, whom Sir Henry Roper cites, and whose industry and talents as an elegant compilator I willingly acknowledge, Mr. Justice Story, leaves the question, as to the expediency of dispensing Law and Equity by one system or two, entirely an open one. He says, in the work quoted from, " whether the one opinion or the other be most correct in theory, it is most probable that the practical system adopted by every nation has been mainly influenced by the peculiarities of its own institutions, habits and circumstances : and especially by the nature of its own jurisprudence, and the forms of its own remedial justice."

1 Story Equity Jurisprudence, Section 36.

33. He thus appears to think that all countries will be prejudiced in favor of the legal institutions they are used to, without inquiring into their value, which undoubtedly is the case ; but as the Hindoos have no prejudice whatever in favor of the English Court of Chancery, and as all their jurisprudence, like that of most nations in the world except the English, contemplates one system and one set of Courts only, it is clear, that if the question is to be decided on prejudices, the argument is in favor of the Law Commissioners' proposal; and if the prejudices of the English interfere or clash with those of the Natives, we learn from most high authority " that the Laws ought to be adapted rather to the feelings and habits of Natives than to those of Europeans."

34. I am unwilling however to weary the Government with further disquisition. Abstract reasoning upon the subject has, as I conceive, been exhausted, and that which is required is a practical experiment of a Court upon the principles in question. An approximation to such principles exists in the Small Cause Court at Bombay, and it is easily within the power of Government to ascertain whether that Court, faulty and imperfect as it is, has proved satisfactory to the public by its mode of administering justice or otherwise.

Report from the Select Committee of House of Commons on the Affairs of the East India Company, 16th August 1832.

35. The difficulty of introducing beneficial legal reforms in England has arisen generally from the opposition of the legal classes; Lawyers, even where they are not animated by exclusive views to their own interests, being prone in the language of Lord Bacon 'to reason in the fetters of their forms and precedents' rather than upon the broad principles of reason;" but fortunately the liberal and unprejudiced tone of mind which characterizes the large body of the European Executive in India, pervades also the legal classes at Bombay in both branches of the profession. I am thoroughly convinced that not the least undue opposition would be offered to the trial of a system holding out benefits to the public, and by many of the profession I am persuaded that it would be hailed as a vast boon.

De Augm. Scient. vol. 9 p. 82 ed. Montague "Jurisconsulti placitis obnoxii et addicti, judicio sincero non utuntur, sed tanquam e vinculis sermocinantur."

36. The other objection alluded to by Lord Bacon as one open to be made to propositions for legal amendment will of course be present to the mind of the Government; I mean that such propositions however fair to view and plausible in speech are often impracticable. A great many well meaning men are desirous of contributing their mite to the fund for human improvement, but their zeal oft overruns their knowledge, and it is the part of an intelligent Government to discriminate between that which is sterling and the base money of ignorant conceited pretenders.

37. I have never concealed from myself the difficulties and obstructions which oppose themselves to the introduction of amendments in the Law, even on the part of 'wise and excellent men.' We are told from high authority that the following are motives which are ever likely to be active in raising this opposition, 1st, a kind of superstitious veneration in men long educated in the profession and practise of the Law, for its *very forms and proceedings*, beyond what is just and reasonable; 2d, an overjealous fear that it may be possible some unthought of inconvenience may emerge; 3d, a jealousy lest any thing offered for the amendment of what is amiss may give a handle to others to ravel the whole frame of it.

38. "But notwithstanding all these difficulties and obstructions, I think that good and wise men may and ought to make some prudent essay even in this great business, and with very good success both to their own reputation and the public benefit."*

39. Such is the conclusion of the greatest Judge who ever adorned the English Bench, and such I firmly believe to be the conclusion of all enlightened Statesmen.

I have the honor to be,
Hon'ble Sir,
Your most obedient humble Servant,
E. PERRY.

SUPREME COURT,
January 21*st*, 1845.

* Sir Matthew Hale; Tract on the Amendment of Laws.

A.

EXTRACT FROM PRIVATE JOURNAL OF SIR ERSKINE PERRY.

July 1st, 1843.—Saturday. Dispatched yesterday to the Law Commission my Minute on the Supreme Courts, recommending at great length a reformed system of procedure in accordance with Bentham's theory, and in accordance also with what has in a great degree sprung up of itself in our Small Cause Court at Bombay. I have taken a great deal of pains with the paper and let it lie by me for a month after. I had written it, in the hopes first of all, of getting Sir Henry Roper to accede to its views so as to forward it with our joint sanction, and secondly, because I did not choose to commit myself to recommending so sweeping a reform with any thing like haste. Sir H. Roper made no objection whatever to my plan, assented indeed to its main conclusions and found no fault with the details, but he either takes so little interest in law reform or is so diffident of himself that I could not succeed in persuading him to give any opinion on the subject, although the matter is forced upon us by the queries of the Law Commission.

After I had forwarded my dispatches, I began reading Lord Hale's tract on the reformation of the Laws, and after reading his denunciation of the tendency to innovations in the Law by hasty thinkers, ambitious men, arrogant self-opinionated reformers, &c., I began to ask myself whether I came within any of these categories, but when I read afterwards his still stronger criticism on the evils of not attempting to reform the Law at all, and of the moods of mind which deterred men the most fit for such a task such as "Judges and other *Sages* of the Law," and reflected that the latter course amongst Lawyers is much the most frequent, whereas any hasty attempts to introduce alterations has never been fairly attributable to them. I shut up the book with a quiet conscience.

I ought to mention that I submitted my plan before I sent it to the *sagest* man here, Mr. Anderson, the Ex-Governor, calling down upon it from him his most unreserved criticism; he encouraged me however with the highest eulogiums and stated. "what a blessing it would be for Bombay if the plan could be introduced, which it could be (he says) 'I am convinced without the slighest difficulty'."

B.

Report of the argument of Counsel and Judgement in the case of Poonjea Cawnjee v. Abdul Rahim Khan, extracted from the Note Book of Mr. Justice Perry.

Thursday, the 30th June, 1842.

PRESENT—THE HON'BLE MR. JUSTICE PERRY.

Poonjea Cawnjee

versus

Abdull Rahim Khan.

Mr. Howard on further directions.

Testator died 15th August, 1830.

Bill filed 14th January, 1832.

Defendant's answer admitted, debt and applications to pay and set up, want of funds, and large debt due to himself.

Reads Answer.

The claimed 31,000 as due to him.

Master allowed him 10,000.

He excepted to Master's Report, and 6th exception was that that Master should have allowed Rs. 13,000.

Fraud.

Master found Rs. 15,873, balance in hand due to Plaintiff.

Stables sold by him to his brother nominally for Rs. 6,000.

Then Rs. 2,000 lent and the whole mortgaged to him Rs. 8,000

Clear fraud.

And therefore Costs.

2. Atk. Hyde o.

Master found the sale fictitious.

Exceptions taken.

States facts as to collection of debts, horses.

Lawson vs. Copeland, 2. Br. ch. ca.

So it appeared here, Defendant negligent in getting in Mahomed Aga's debt, took his bond.

Although alleged he was insolvent.

Then history of sale of Horses never explained.

And Master charged him with the whole, Court then put it to me whether I would admit the Horses properly taken for debt, Rs. 17,000.

I did admit.

Whereupon order made by consent.

And Report is.

Horses not properly brought to account.
Therefore several cases of fraud.
Also Master states outstanding debts.
One of 31,000, another of 1,500.
Yet in last examination Ali Cawn state she has paid the debt (1,500) to the Estate.
Therefore should pay costs.
1st Report charged him with Rs. 58,000.
That went on principle of charging him with whole of Aly's Estate.
But must be altered becasue Horses to be substituted for Rs. 17,000.
The value to be charged for them is to be ascertained from estimate given by his own witness Aga Goolam Rs. 12,000.
Said the Horses (50) were sold 500 a piece.
But that may be when 30 other Horses sold, but these 19 Horses worth much more.
One of them sold for Rs. 1,200.
If Executor employs Agent to sell Horses of Estate, and Agent sells Horses of his own at same time in lump.
Duty of Executor to ascertain what Agent's Horses were worth.
Therefore not justified.
He never took.
Steps to inquire.
Agent said Horses were worth 11 or 12,000 Rs.
Master has allowed Defendant—
On debt of Rs. 10,000.
Interest Rs. 8,106 to February 1839.
On another debt which Defendant alleges he was Security for—
Master has allowed 9,000.
Result of Schedule.
Master to be charged

Rs.	68,000.
	53,124. Allowance to Defendant.
	15,783.

Question whether this fair way to treat creditor.
Who sued at once.
And kept at arms length
For so many years.
Then as to outstanding debts.
His own witness
Says he has paid it.

I say, 1st, Defendant should be charged with 12,000 for Horses under date of 1st July 1832.

2d. with debt of Sudjee Ali Cawn.

Rs. 1,525.

3d. That Master should calculate over again what is due to Defendant by taking last receipt.

July 1832, and

Then strike a balance and charge the Defendant an interest on that balance and allow him no interest from that time.

That Master should inquire.

Whether taken proper steps to get in the large outstanding debts and whether he should be charged with any portion.

Lastly. That he should pay taxed costs also for annual rests.

Dickinson on S. S.

If Executors are guilty of fraud or negligence, are liable as to costs.

1 Madd. 290.

So as to interest.

If Executor has assets.

To pay Interest.

And does not so.

Must pay Interest.

When Horses were seized, there were other Horses which might have been seized.

Clear our Horses were worth more than he sold them for.

Reads.

Campbell Contra.

Even if this a case between Europeans sufficient to show costs not to be granted, much less payment and or. matters which cannot now be considered.

A fortiori between Natives.

Whole delay from laches of plaintiff.

Bill was filed January 1832.

Our answer April 1832.

Where was negligence there.

They then amended.

Shows no delay.

Not justifiable for Creditors to push on suit.

Where no assets.

Only question now as to costs.

If Creditor pushes on litigation when no costs.*

* Should be assets. E. P.

11 Law Journ. Jan. 1842.

King vs. Harrett.

A distinction.
This not a suit for.
Administration of assets.
But to obtain his own.
Debt.
Defendant always admitted, debts stated, our large debt not admitted.
We said our debt was 12,000, and that we were liable on guarantee for 12,000 more.
Master has allowed 11,000.
What fraud in that.
Suppose we claimed more than proves in law to be owing.
Judges bound to temper the rigour of English law between Natives.
Especially law of Executors which is unknown to them.
As to Stables said we claimed credit for.
Selling for more than value.
Transaction between brothers, not very accurately.
Calculated perhaps, perhaps other considerations.
But Govt. Maistry has sworn they were worth Rs. 4,000.
So.
We took a Mortgage.
I say therefore evidence of two valuers justified our round.
Assertion of value.
Also that of other Stable-keeper.
Then if party afterwards become indebted.
Quite prudent in him to take security.
And an affair between brothers.
We still estimate value at 4000.
We were and are ready to take them at 8.
But where is the fraud to fix costs ?
Principal of Law laid down.
That Master has charged several items, not because received.
But because so chargeable by the law of England.
Very favorable for me according to.
My principles.
1 Myl. and cr. 92.
Very doubtful even by that law, whether Executor would be chargeable, cites
1 Crompton and M. 402.
Pennington *v* Henley.
As to the amount due on the Horses.
The Master has found we ought to be charged with 9000 Rs.

If as other side alleges.
We ought to be charged with more, should have excepted to Master's Report.
Question not open.
Then as to bond.
Said fraud.
That we took bond for simple contract debt.
Great advantage in taking it.
No devastavit.
Reasonable discretion.
Another question whether it made us legally responsible for the debt.
As to outstanding debts.
Faintly urged.
Not made out, we received them.
All that disposed of in 1st exception to Master.
Another case as to costs.
Blewett *vs.* Jacob, 240.
Robinson *vs.* Elliot 1, Russ. 599.
1 Russ. *v.* Myl. 426.
Howard, reply.
As to Stable, in 2d answer this.
(Reads.)
The bond was given between 2d and 3d answers.
Prevented us from obtaining debt.
Alleges that he was insolvent.
Said if he had suppressed bond, it would have been otherwise.
Condition of bond is to pay him personally.
Executor mere description.
At the time when we were screwing him up to admit assets, he takes upon himself to take bond.
And he was accordingly charged with it.
This as to Stables.
(Reads 2d answer.)
Master's finding value 8000 Rs.
Was excepted to, and,
Confirmed;
That question settled.
The sale found fictitious and
Fraudulent.
Sufficient to
Decide question as to costs.
Then as to Aga Goolum's retainer of 1800 Rs.

He was at very time a debtor to Estate.
Then as to statement of Master's finding that 9000 Rs. sum to be charged with, he only finds that that sum has come to hands of Defendant.
Master could not state under the decree.
What Defendant ought to be charged with for Horses.
Defendant in his 2d answer set up debt due to himself, 31,967.
Trying to stop us in limine.
Master in last Report finds a balance to us of Rs. 15,000.
Then as to outstanding debt
Ali Cawn says he has paid it.
Where is large debt of 31,000.

C. A. V.

Thursday, 21*st July*, 1842.

Judgement delivered by Sir Erskine Perry.

The question which remained to be considered in this case when it came on for further directions was whether on the one hand the defendant as Executor had not subjected himself to costs by carrying on a harrassing and fraudulent defence, and whether on the other the plaintiff had not disentitled himself to them, by having commenced and carried on his suit when there were no assets from which his claim could be satisfied. This made it necessary for me to go through the proceedings in the cause, and I have also looked into the authorities.

The simplicity of the Rule at Common Law which gives costs to the winning party, however doubtful his claim may have been, and however much a subject for fair litigation, saves so much painful inquiry and is based on such sound principles, as to recommend itself for adoption wherever the discretionary power of the Court is left free to act, and it is evident that the course of decisions in Equity is gradually conforming itself to such Rule, leaving a margin however for exceptional cases where undue litigation has been carried on, or where meritorious trustees have been made parties; Vancouver *vs.* Bliss 11. Ves. 463. Millington *vs.* Fox 3. M. *v.* c. 338.

But if this be the Rule to be applied generally, even when a party may have had fair grounds for contesting a claim, which is afterwards established in Court, how much more forcibly must it apply, when a just claim is resisted and a series of defences set up, the falsehood and

untenableness of which can only be established by a ruinous expense and years of litigation.

The facts of this case may be stated in half a dozen lines. The plaintiff has a claim against the defendant as Executor of Abdul Kurrim Khan, who died in 1830, for 2,500 Rupees—after much application to him for an account, and for a payment out of the assets, both of which the defendant refuses, the plaintiff files his bill in January 1832.

The defendant puts in an insufficient answer, but an answer which if true would completely defeat the plaintiff's right of action and subject him to costs if he proceeded. For he states that there are no assets to pay the debt of plaintiff and that all that has come to his hands of the Testator's Estate is of very inconsiderable amount, and wholly insufficient to pay his just debts and funeral expences. Now after a litigation of ten years and a half duration, protracted to this extent be it observed entirely by the delays interposed by the defendant, it turns out that all the defences set up by the defendant in his first answer are untrue.

There are assets, there were, long before the bill was filed, assets of a very considerable amount, and when all the deductions are made which a very favorable interpretation for the defendant has allowed him, assets five times exceeding in amount the original claim of the plaintiff.

If, again, one follows step by step the proceedings in the cause, we find that the defendant has been driven into every admission, and every fact in his knowledge necessary to be made known for a decision in the cause has been wrung from him, only as it were at the point of the sword, and after all means of defence within his reach had proved fruitless.

But what system of law must that be, which enables a party to resist successfully for twelve years the payment of a just claim, to put up all sorts of defences, to interpose all kinds of delay and finally when Judgment of the Court is against him upon each and every point, absolves him from any portion of the costs to which his harrassing and dishonest procedure have exposed the plaintiff.

The grounds upon which it has been sought to bestow this immunity on the defendant are, as it would seem, two; first, that even as between Europeans the defendant, as Executor, would not be liable to costs, and secondly, even if he were so liable, still that as a Native the rigorous rules of English Law are not to be applied to him.

This second objection I disposed of during the argument, and I need only repent now, that I should be doing great injustice to the Native population generally, if I relaxed one iota of any rigorous rules which may serve to keep Executors to the due execution of their trust. No one is called upon to be an Executor, the office is in all cases accepted voluntarily, often with eagerness, but as it is an office which gives a man the handling of other people's money, a Court of Justice cannot be too vigilant in maintaining all due checks upon it, and I have seen nothing in this country to induce me to relax any portion of this vigilance in favor of Native Executors.

The main ground therefore upon which the defendant must rely is, that having been sued en antre droit and no conduct of his having made that suit necessary, or caused any needless expence, he is entitled to the favorable interposition of the Court in respect to costs. Undoubtedly Courts of Equity have always been ready to protect trustees from any portion of the costs of a suit in which they are made parties solely in respect of their representative character, and independently of any conduct or misconduct of their own; and so also even where a trustee has conducted a defence harrassingly and with impropriety, though the Court will visit him with costs for such part of his defence, still if he were brought into the suit as a necessary party, and it was not *occasioned* by any conduct of his the Court will not throw upon him the whole costs, Tebbs *v.* Carpinter, 1. Madd. 296. The application of this principle enables me to dispose of this case, for having satisfied myself that the defence subsequent to the filing of the bill, was such as ought to cast the defendant in costs, for so much of the proceedings, I only have to look to the defendant's original answer to see that his misconduct in refusing to account originally, made the suit necessary, and therefore throws upon him that portion of the costs also, anon 4. Madd. 273.

It remains only to examine the cases which the defendant relies upon.

The first is King *v.* Hammett, 11. Law I. ch. 14, the marginal note of which is,—"a simple contract creditor filed a creditor's bill having been *correctly* informed by the Administratrix of the Estate of the accounts, and that judgement creditors would consume all the assets; the plaintiff was ordered to pay the costs," and that case I take to be perfectly good law. But I am of opinion that the converse of the case equally holds and that when the Executor *incorrectly* informs that creditor of the Estate of the assets, refuses an account, and protracts a suit through ten long years, he should be ordered to pay costs; and that is

the case here. Bluett *v.* Jessop Jac. 240. may receive the same answer, for there it appeared that there were no assets available for the plaintiff's demand, and the defendant said so in his answer, here there are assets, and the defendant denied it in his answer. Robinson *v.* Elliot, 1 Russ. 599. and Goring *v.* Everest 1 R. and M. 426. fall within the same category.

I am therefore of opinion that the defendant has wholly failed in making out any ground to be exempted from payment of costs, and the onus lay on him to do so, a good deal of discussion took place at the bar as to the fraud in the defence, but I have not thought it necessary to base my judgement on the particular instances relied upon. There is a class of men who cannot be made to pay their just debts without the strong arm of the law, and if I may judge from the line of defence adopted in this action, the defendant is one of them, but at all events I can have no hesitation in deciding, that such a defence as has been here made is unwarrantable and fraudulent, and subjects the party making it whether trustee or principal to the costs of suit.

True Copy,

O. W. KETLUN,
Clerk to Mr. Justice Perry.

C.

Return of all the Costs Taxed in the Master's Office at Bombay, during the years 1840, 1841, 1842, *distinguishing defended Causes, from Exparte and Cognovit (undefended) Causes.*

1840.

Defended Causes.				Exparte Causes.			Cognovit Causes.		
Plaintiff's Costs.			Defendant's Costs.				Plaintiff's Costs.		
425	1	0	521	2	0	698 1 0	130	1	0
436	3	0	517	3	50	290 2 0	489	1	75
295	2	0	1996	2	50		123	2	50
366	2	50	825	2	0	2)988 3 0	107	0	0
500	2	50	132	1	0		55	1	0
478	0	0	571	3	0	494 1 50	206	1	0
1688	3	0	1639	0	0		124	2	0
751	3	0	368	1	0		157	1	0
407	2	0	597	0	50		88	2	0
347	0	0	325	3	50		99	1	0
860	3	0	794	0	50		302	2	0
467	3	0	387	0	0		106	3	0
594	2	0	536	3	0		160	0	0
560	2	0	625	0	0		148	2	0
486	1	0	537	1	0		157	3	0
509	1	0	938	2	0		127	1	0
411	2	0	745	0	0		155	1	0
627	0	0	476	0	0		97	2	0
413	1	0	365	3	0		142	1	0
596	1	0	264	3	0		317	1	0
626	1	0	379	2	0		223	1	0
2578	1	0	425	1	50		205	3	0
929	3	0					147	3	0
439	2	50	22)13970	3	0		144	1	0
458	0	0					212	0	0
869	0	0	635	0	13½		162	3	0
342	3	50					130	3	0
597	0	0					157	1	0
464	2	0					128	1	0
770	1	0					96	3	0
424	2	0					121	1	0
1851	3	0					122	0	0
782	1	0					150	0	50
528	1	0					152	3	0
263	1	0					134	3	0
2811	2	0					98	1	0
403	1	50					116	1	0
659	3	0					153	1	0
400	2	0							
596	3	0					38)6053	2	75
469	0	75							
1790	3	0					159	1	23
1379	2	75							
655	3	50							
414	1	0							
588	2	0							
665	2	0							
47)34486	3	50	(733	3	69)				

1841.

Defended Causes.						Exparte Causes.			Cognovit Causes.		
Plaintiff's Costs.			Defendant's Costs.			Plaintiff's Costs.			Plaintiff's Costs.		
415	0	0	236	0	0	303	3	0	131	2	0
258	1	0	570	1	50	482	1	0	254	1	0
906	1	0	215	0	0	568	1	0	218	2	0
1102	1	50	307	0	0				140	2	0
670	2	0	772	1	0	3)1354	1	0	141	3	0
789	3	0	517	1	0				258	2	0
266	1	0	354	1	0	451	1	66¾	80	2	0
266	3	0	236	0	0				160	1	50
416	3	50	351	1	0				191	3	0
377	1	0	789	0	0				218	2	0
676	2	0	336	3	0				141	0	0
624	2	0	454	0	0				190	1	0
878	2	50	218	0	0				301	0	0
1155	2	67	673	3	0				113	0	0
453	3	0							113	3	0
559	1	0	14)6030	3	50				151	1	0
340	0	0									
360	2	50	430	3	10¾				16)2806	1	50
608	0	0									
533	0	0							175	1	59⅓
793	2	0									
21)12452	2	67									
592	3	96½									

1842.

Defended Causes.						Exparte Causes.			Cognovit Causes.		
Plaintiff's Costs.			Defendant's Costs.			Plaintiff's Costs.			Plaintiff's Costs.		
761	1	0	1123	2	0	411	0	0	291	3	0
468	3	0	777	1	0	405	0	0	88	2	0
647	3	0	412	3	0	385	3	0	176	0	0
460	3	0	548	2	0				213	3	0
285	0	0	347	3	0	3)1201	3	0	173	2	0
334	1	0	573	1	0				286	2	0
797	3	0	1756	1	0	400	2	$33\frac{1}{3}$	181	3	0
592	0	0	399	2	0				138	1	0
498	2	0	442	0	0				156	1	0
404	1	0	115	0	0				148	1	0
703	0	0	369	2	0				171	3	0
1143	2	0	724	2	0				407	3	0
337	0	0	695	2	0				143	3	0
346	1	0	569	0	0				289	1	0
695	0	50	554	2	0				636	1	0
330	3	0	939	2	50				193	2	0
813	3	0	405	0	0				186	1	0
352	3	0	368	2	50				100	0	0
526	0	0	616	3	0				133	1	0
676	3	0	673	2	0				201	1	0
676	3	0	428	3	0				683	0	0
329	2	0	709	1	0				358	0	0
440	0	0	529	0	0				150	2	0
419	3	0							262	1	0
653	2	0	23)14079	1	0				195	0	0
653	3	0							103	2	0
713	2	0	612	0	$56\frac{1}{2}$				237	2	0
669	0	0									
604	1	0							27)6307	1	0
792	0	0									
480	3	0							233	2	$44\frac{3}{4}$
461	0	0									
32)18069	0	50									
564	2	64									

D.

Return of the Taxed Costs in twelve defended actions tried in 1842, *where there were no extraordinary circumstances to mark the Cases.**

Plaintiff's Costs, where the verdict passed for him.				Defendant's Costs, where the verdict passed for him.			
1. Doe d. Jejeebhoy, *vs.* Doolubdass,	615	0	0	1. Dadabhoy Pestonjee, *vs.* De Cruz,	673	0	0
2. Nursingdass, *vs.* Tribhowandass,	695	0	0	2. Pettamberdass Wittuldass, *vs.* Khooshaldass,	724	0	0
3. Edmunds, *vs.* E. India Company,	813	0	0	3. Muccondass, *vs.* Ogilvie,	695	0	0
4. Cassim, *vs.* Govind Ramjee,	676	0	0	4. Gonsalves, *vs.* De Cruz,	569	0	0
5. Sherefally, *vs.* Sorabjee,	554	0	0	5. Jaichund Bhimjee, *vs.* Moorajee,	939	0	0
6. Lickee, *vs.* Gunput Bapsia,	792	0	0	6. Hamaboye, *vs.* Bhawoo al Gopall,	529	0	0
Average Costs of each Plaintiff,	690	12	0	Average Costs of each Defendant,	688	2	0

Total average Cost of a Defended Suit to the parties, Rs. 1378 14 0

* As the costs of the winning party only are usually taxed it has been found necessary to take the calculations from twelve actions instead of six.

TO THE RIGHT HONORABLE THE GOVERNOR GENERAL IN COUNCIL, &c. &c. &c.

RIGHT HON'BLE SIR,

I have to submit the accompanying observations upon Sir Erskine Perry's letter, dated the 25th of January 1845, addressed to the Hon'ble the Governor of Bombay in Council, and I have to beg that the observations now transmitted, as also the document which, in order to correct an error, I had the honor to forward on the 25th instant, may be considered as supplemental to my observations upon the Report of the Law Commissioners, dated the 15th of February 1844, and the other documents to which that Report refers.

I have the honor to be,
Right Hon'ble Sir,
Your most obedient Servant,
H. ROPER.

BOMBAY,
January 31*st*, 1845.

HAVING yesterday received a copy of a Letter, dated the 25th January, addressed by Sir Erskine Perry to the President of the Council of India in Council, as also a copy of a Letter written by Sir Erskine Perry to the Governor of Bombay in Council, a copy of which it appears was transmitted along with his Letter to the President of the Council of India in Council, I must add a few observations to those I have already made upon the Minute and Letter of Sir Erskine Perry, relating to the establishment of a new Court of Justice.

I reluctantly engaged in the controversy in question, for not only do I think that legislative discussions by Indian Judges should be discouraged for several reasons, but I was aware that projectors of law reforms often express themselves in unmeasured terms of those who differ from them in opinion, and I was unwilling to expose myself to misrepresentation or reproach. I also knew that in controversy it was difficult to avoid using strong expressions, and feared I might myself give occasion for fretfulness or anger. Accordingly, in the first instance, I represented to Sir Erskine Perry that the Law Commissioners had not invited any discussion of the subject. His reply convinced me that any further representation to that purport would be ineffectual. And yet it

seems to me from Sir Lawrence Peel's Minute, that the Judges at Calcutta did not believe that the letter *they* had received from the Law Commissioners invited any such discussion, and that the Judges at Calcutta merely entered into the matter because a copy of Sir Erskine Perry's Minute had been sent to them. It also appears to me that the Law Commissioners in their report shew that they were rather surprised at Sir Erskine Perry having brought forward the question. I never supposed for a moment that Sir Erskine Perry and the Law Commissioners had arranged by "previous communications" that their recommendations should be contemporaneous, and although Sir Erskine Perry, in his last letter to the Government of Bombay, has distinguished by inverted commas the expression, "previous communications," as if he attributed it to me, I am not aware that such a phrase or suggestion is to be found in any of the observations I have written. Sir Erskine Perry may have conversed upon the subject when at Calcutta, and may thus have become aware of some of the views of the Law Commission. Whether he did or not is of no importance that I can see, and I merely assigned my ignorance of the unanimity which existed between Sir Erskine Perry and the Law Commissioners as an excuse for the superficial manner in which I first treated the subject. Had I been aware of the similarity of their views, and that Sir Erskine Perry's Minute would be so much relied on, I should at once have gone into the matter much more fully.

Being urged by Sir Erskine Perry to write upon the subject I relieved myself from the task, upon as easy terms as I could for the reasons already given, and in doing so I expressed my dissent briefly and in terms complimentary to Sir Erskine Perry. I little knew at that time that what had passed between us would be entered in a private journal, or that the course I had pursued with a view to avoid unprofitable discussion would be recorded as establishing that I was an enemy to legal reform, and I cannot but think that private journals which are occasionally to be made public are rather formidable, as rendering character insecure, and social and official intercourse very perilous.

Last April Sir Erskine Perry asked me if I had seen the Report of the Law Commissioners and informed me that a copy had been sent to him. I did not however see his copy, and afterwards, having applied for one myself, the Law Commissioners sent it to me, at the same time informing me to the effect that it was sent as a favour and that I was not officially entitled to it. I should not have considered myself at liberty to submit to the Government comments on a document thus received

had I been otherwise disposed to write about it, but I felt no such disposition, for I wished to avoid trouble and discord, and the Judges at Calcutta had I thought said enough upon the subject. Meanwhile Sir Erskine Perry had gone to Mahabuleshwar, and I had no idea that he was writing or had written any thing further about the matter until some time after his letter of May 1844 had been sent to the Government of Bombay. In June he sent to me a copy of that letter, and when I had read it, being still anxious to avoid trouble and dissension, I returned it, simply observing that if the Government wished for my opinion I supposed it would be asked for.

From the like feelings when the Government of Bombay informed me that the Government of India requested the opinions of the Judges, I for a time forbore to write upon the subject, and told some friends that I should not give any further opinion about it. It was represented to me that I ought to state my views of the matter, and that due respect for the Government of India rendered it incumbent on me to do so. Accordingly I commenced to write, but being interrupted by peculiar circumstances of a private nature gave up for some weeks the intention of proceeding with it. I resumed during the November Term, but being interrupted by the December Session, and being anxious, if writing at all, to go rather fully into the question, I had not finished what I admit is a very discursive and tedious essay till the middle of December. But whatever may be its demerits I was most anxious to avoid giving avoidable offence. I therefore not only altered two or three passages which a gentleman upon whose judgment and good feeling I relied, and to whom I read the essay and who also read it over himself objected to as likely to prove offensive, but I also struck out other passages which he thought were of a different description but which I feared might be misconstrued. I mention these particulars to show that I have not intentionally offended. If the discovery or disclosure of erroneous statements of facts has excited anger, however I may regret it, I cannot see that I should or could have avoided it, for had I failed to make such discovery or disclosure the task imposed on me would have been still more imperfectly performed.

When the observations had been copied they were transmitted to the Government of India simply because I had been officially informed that the Supreme Government required them. It is true that whilst they were being written and even after they were completed, I did not consult Sir Erskine Perry respecting them. I merely followed the course he had pursued with respect to his letter of May 1844 to the Government of Bombay, of which I did not know or hear any thing till

weeks after it had been sent to the Government. In like manner, after the last October Session, he wrote to the Government of Bombay respecting important matters connected with the Court, and I had no information on the subject till a copy of his letter was sent to me by the Officer of the Court. I accidentally heard that afterwards another letter upon important subjects had been sent by him to the Government, and it was not till weeks after I had the information that he wrote to me saying he had addressed a letter to the Government respecting the Small Cause Court, and, either that the Prothonotary would give me a copy, or that he had desired the Prothonotary to do so. I sent for the copy :—it was not forthcoming. At length I asked the Prothonotary for it. He demurred; intimated that he had not been desired to give me a copy, but said that if I told him I was to have a copy, it should be given to me. I declined going further for I apprehended there might be something in the letter which it would be unpleasant to me to read. I do not object to Sir Erskine Perry thus communicating his views to the Bombay Government without consulting or communicating with me. He gives them as his own opinions not as mine, or as ours jointly, but it leaves me equally at liberty to write my opinions, especially regarding matters not official such as his Letter and Minute and the Report of the Law Commissioners, without previously communicating them to him. Accordingly, upon the late occasion I followed the examples he had set me.

But it is made a matter of reproach against me that "for a period "of sixteen months I never gave Sir Erskine Perry the least reason to "suppose that I entertained any doubts whatever as to the accuracy of "the facts he had advanced or as to the law he had delivered in Poonjia "Cawnjee's case." Had I been aware from the sketch or outline of his Minute which Sir Erskine Perry sent to me in May 1843, or from any other source that the facts he had advanced or the law he had delivered in Poonjia Cawnjee's case were doubtful, I should then have expressed those doubts to him accordingly, but should have endeavoured to avoid controversy with him upon the subject. I did not become aware that such law and facts were doubtful until last October when I began to write upon the question. The mischief had then been done—the errors made public. It was incumbent on me to disclose them, and I appeal to professional men whether in the notice I took of them I did not put the best construction on the matter, notwithstanding what Sir Erskine Perry has expressed in his last letter to the Governor of Bombay in Council.

I have spoken of the sketch or outline of his Minute which Sir Erskine Perry sent to me in May 1843, for what he did sent to me on

that occasion was not the Minute itself as ultimately sent in by him, but a rough sketch or outline only. So far as I can recollect there were blanks left to be filled up with schedules and details. I read it in a cursory manner, making a few memorandums in pencil of what appeared to me the more material topics, and to which, in case I should have occasion to write upon the subject, I intended to allude. Sir Erskine Perry afterwards sent to me the letter dated the 29th of June, (either the draft or the fair copy) which he wrote to the Law Commissioners, and along with which his Minute, dated the 3d of June, was, I believe, transmitted to Calcutta, but I have no recollection of having ever seen that Minute in its matured and perfect state, and my firm conviction is that I never did see it until the printed copy was received by me from the Law Commissioners. This conviction is strengthened by recollecting that when at the Bar I had been much annoyed at an oversight of mine as Counsel for the defendant. Abdool Rahim Khan, having given occasion to an exception to his answer, and as the exception had immediately been submitted to a statement in any Sketch or Minute shown to me to the effect that such an exception had actually been argued could scarcely have escaped my attention, for the names of the parties were familiar to me owing to that very exception, and a few days before the case had come on for further directions before Sir Erskine Perry in the June Term 1842. I had been enabled to attend the Court for a day or two, and had then enquired from the bench, in presence of Sir Erskine Perry, whether I had not been Counsel in the cause, and on receiving an affirmative reply, said that I should not attend when the cause should be again brought forward. I have no recollection of having seen in any Sketch or Minute previously to October last, any statement that such exception had been argued, and my conviction is that I had not; consequently I cannot but think that no such statement was contained in the sketch or outline sent to me in May 1843. When I received the printed copy of the Minute and Report, &c., from the Law Commissioners in May 1844, I concluded I had already read what the Minute contained in the sketch or outline sent me by Sir Erskine Perry in May 1843, and although I observed schedules or lists in the printed copy, whereas I believed they had been omitted in the sketch or outline, I did not enter into or read them, for I supposed they were consistent with what such sketch or outline had contained, and I therefore limited myself to a very cursory perusal of the Report of the Commissioners and the Minute of Sir Lawrence Peel. When, however, I was persuaded to write upon the question I read all the papers, including Sir Erskine Perry's Minute, carefully through, and thus became aware, for the first time, that the last mentioned Minute differed in some respects from the sketch he had forwarded to me in May 1843, and which it appeared to me, had been

improved upon so that the Minute was more perfect in style than the sketch; and then also for the first time I perceived the statement that the exception to Abdool Rahim Khan's answer had been argued. On observing it my attention was roused. I enquired whether that was not the cause in which I had been Counsel and whether I had not drawn the answer. On receiving a reply in the affirmative I desired the Registrar to send the papers to me, and on examining them observed that the statement of the exception having been argued was an error. Sir Erskine Perry makes light of it as solitary and trifling, but I considered it important, and on further examination of the case also discovered, that although it was stated in the printed Minute of Sir Erskine Perry that an application for an account of the Testator's assets had been made prior to filing the bill, yet that in fact there was no evidence in the cause or ground for stating that any such application had been made. The importance of this last error with respect to costs will be apparent from the anonymous case 4 Mad. 273.

It further appeared that no notice had been taken in the printed Minute of a mistake committed by the Master, the effect of which was that a balance had been found due from the defendant whereas but for the mistake the balance would have been in his favour. I was for some time puzzled to account for this mistake, and for the mode in which it was corrected, but the Master himself explained to me that he had committed it by debiting the defendant with the whole amount of a certain portion of a debt due to the Estate, but which portion the defendant had compromised by receiving certain Horses which had produced a much smaller sum: that he, the Master, had thus overcharged the defendant because he had considered the defendant's answers to interrogatories as unsatisfactory and evasive, &c. I at first could not perceive that this objection had been made the subject of exceptions, but the Counsel for the plaintiff told me that it was, and that the exceptions were overruled on technical grounds, the Judge expressing his opinion that it should be referred back to the Master to consider whether the compromise was not fair and reasonable under the circumstances, and he, the Counsel, having admitted that it was fair and reasonable a reference was thereupon made to the Master to correct the error and to report whether the property actually received on such compromise had been fairly brought to account. On examining the proceedings filed in the Registrar's Office I find such was the case, that the objection to the above overcharge of the defendant was made the subject of exceptions, but they were overruled, the Judge at the same time providing that justice should be done in the matter, and thereupon the Counsel for the plaintiff, in order to save time and expence, and because, as he has

informed me, he could not successfully resist, admitted that the compromise had been reasonable and fair.

The result of the second reference to the Master was that the defendant was reported not to have brought fairly to account the sums actually received, but instead of the balance being against the defendant the Testator's Estate was found indebted to him in 884 Rupees. His defence had been that the Estate and Effects of the deceased come to his hands were insufficient to pay the debt he admitted to be due to the complainant, and he claimed a debt to be due to himself, payment of which out of the assets he was entitled to. Such a defence is usually expressed by the phrase "want of assets." Thus the defence want of assets, was established and the plaintiff lost his debt in consequence, notwithstanding which Sir Erskine Perry's printed Minute states "a decree on all points raised by the defendant was made against him." This does seem to me an important inaccuracy, in proof of which the facts that a balance was found due from the Estate to the defendant, and that not a Rupee was ordered to be paid to the plaintiff in satisfaction of the debt he claimed are as insurmountable as they are incontestable, and I submit them together with Sir Erskine Perry's notes and judgment, &c. which accompany his letter to the Government of Bombay, for the consideration of the profession in India and elsewhere. The ordering part of the decree was as follows and nothing more.

"And this Court doth order and decree that the said defendant do "pay to the said complainant his costs of this suit, to be taxed by the "Master of this Honorable Court."

But Sir Erskine Perry seems indignant at my having canvassed the case because I had merely been employed in it as Counsel whereas he had officiated as Judge, and hence his conclusions respecting it ought to be above all controversy on my part. My occupation however as Counsel in the cause ended on the 14th November 1835 when the decree was taken *by consent*, I had nothing to say to the Reports of the Masters, or to any of the exceptions to those Reports, and had left this country, intending never to return to it, long before the argument of the first exceptions. The knowledge of the case I had as Counsel merely availed me so far as to quicken my perception of the erroneous statement that the exception to the first answer had been argued, and the detection of that error naturally made me look further into the case. But all the errors were ascertained by the official documents filed as of record on the Equity side of the Court. Moreover, I do not impugn Sir Erskine Perry's judicial decision, I rely upon the final order he made as estab-

lishing that 884 Rupees were found due from the Estate to the defendant, and that the complainant took nothing by his suit, except indeed that all his costs were ordered to be paid by the defendant, a part of the order, which, lest it should be attacked, I have done my utmost to defend. Sir Erskine Perry gainsays or misapprehends his own final order in the cause when he says in his Minute "a decree on all points "raised by the defendant was made against him," for as already shown the result of the suit as to the principal point, want of assets, was in favour of the defendant.

Sir Erskine Perry extra-judicially put forward the case in his Minute as an example. To ascertain whether the details he gave were correct I did as any other man might do, as Sir Edward Sugden did to ascertain whether the account of Rattle and Popham imputed to Lord Mansfield was correct. I examined the official documents. I did so extra-judicially, and under the impression that the case could never come judicially before me, for the general rule being that there can be no rehearing or appeal upon the question of costs, I believed that if upon that point the decision had been erroneous (which I by no means admit) the defendant was wholly without a remedy. Whether he could appeal to the Queen in Council is a question I have not investigated or considered.

I do not impute the errors I have disclosed to any the slightest moral turpitude in Sir Erskine Perry. They are easily to be accounted for upon very different grounds, and, as already observed, I appeal to professional men whether in putting them forward I might not have enlarged upon them in much stronger terms. It was important to disclose them, for I could not concur in Sir Erskine Perry's opinions and therefore wished that his authority should not be held conclusive, but that his recommendations might be narrowly examined before being adopted. In like manner, and with similar views I thought it expedient to mention what appeared to me to be errors or misconceptions on the part of the Law Commissioners, for although that body, being peculiarly constituted, are not, in one sense, so high authority as Sir Erskine Perry, yet they have statutable weight, for the Governor General in Council is bound by Act of Parliament "to take their Reports into consideration"—3 and 4 W. IV. Cap. 85, Sec. 54.

Sir Erskine Perry intimates in his last letter to the Government of Bombay, paragraph 14, that he does not combat my remark that it would be misapprehension to suppose that such evils as are exemplified by the statement in his Minute of Poonjia Cawnjee's case are of common

occurrence. It may extenuate my error on this point to say I was misled by the following words referring to the case in the 20th paragraph of his Minute. "If the case above cited had any extraordinary cir-
"cumstances connected with it, it might be safely passed over as
"anomalous, but it is not so, &c."

With respect to the 19th, 20th and 21st paragraphs of the same letter to the Government of Bombay, I may also plead that Sir Erskine Perry's original remark as to the interests of suitors being concluded for ever was unqualified by the observations he has now made upon the passage, and by which it appears he did not mean that a decision on a technical point *legally* binds the suitor for ever, or at least always, but that poverty may preclude him from obtaining justice as illustrated by the usual reference to the ability of a penniless man to enter the London Tavern. The qualification was not originaliy expressed, and I did not perceive that it was implied. My fear was that the Members of the Indian Governments who are not Lawyers, and for whose information the passage was intended, might be greatly misled by it.

Three days before I received the copy of Sir Erskine Perry's last letter to the Government of Bombay, the Officer of the Court had imformed me of the error regarding costs alluded to in the 18th paragraph of that letter and into which that Officer had led me, and I forthwith transmitted the correction to Calcutta. I am not at present aware that he has discovered any errors in those other statements of his regarding costs in the Supreme Court which I have submitted to the Government of India.

With regard to the 29th paragraph of the same letter, it is very clear from my observations that I did not enter into the history or origin of pleading, and had no occasion to quote the passage in Mr. Serjeant Stephen's work which Sir Erskine Perry has cited, or to refer to the extract from Bracton 372 b, which Mr. Serjeant Stephen has given in the Appendix. There was no apparent ground for ascertaining whether "the meaning of the distinction used by jurists of oral pleadings and "written pleadings had wholly escaped me" or not, for I had limited myself to noticing the fact that by oral pleading the Law Commissioners mean one system and Sir Erskine Perry another. In conversation I have two or three times said that Sir Erskine Perry's system was the more rational as being the more feasible and consistent.

H. ROPER.

G. H. Huttmann, Bengal Military Orphan Press.

00108153

Digitized with financial assistance from the
Government of Maharashtra
on 18 July, 2018